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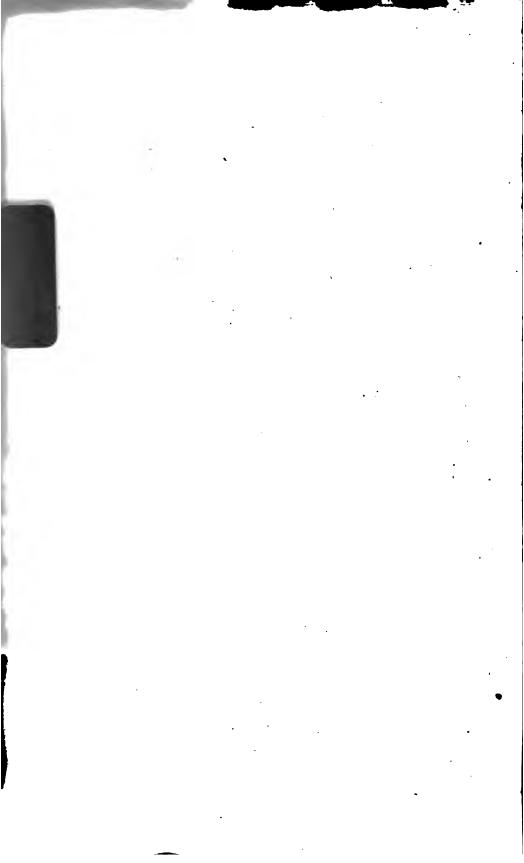
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## REPORTS OF CASES

ARGUED AND DETERMINED

IN

# The Court of King's Vench;

DURING

EASTER AND TRINITY TERMS.

IN

THE SEVENTH GEO. IV.

**8** Y

JAMES DOWLING, Esq., of the Middle Temple,

AND

ARCHER RYLAND, Esq., OF GRAY'S INN, BARRISTERS AT LAW.

VOL. VIII.

WITH AN INDEX

AND

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### JUDGES

OF THE

### COURT OF KING'S BENCH,

During the Period comprised in this Volume.

Sir Charles Abbott, Knt., C. J. Sir John Bayley, Knt. Sir George Sowley Holroyd, Knt. Sir Joseph Littledale, Knt.

Sir John Singleton Copley, Knt. Attorney-General. Sir Charles Wetherell, Knt. Soli-

CITOR-GENERAL.



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### CASES

#### ARGUED AND DETERMINED

IN THE

### COURT OF KING'S BENCH,

### EASTER TERM,

IN THE SEVENTH YEAR OF THE REIGN OF GEORGE IV.

OGDEN and another v. PEELE and others, assignees of WADDINGTON, a bankrupt (a).

HIS honor the Vice Chancellor sent the following case for the opinion of this Court:

The plaintiffs are natural born subjects of the United land, had deal-States of America, and, during the time in which the transactions hereinafter mentioned took place, were mer- previous to chants residing at New York. The bankrupt is a natural born subject of this country, and, during the same time, was a merchant residing in London, and carrying on business there, under the firm of Henry Waddington and Co. on 24th Decem-The plaintiffs and the said Henry Waddington, before his liminaries of bankruptcy, for several years prior to the late war between this country and America, had extensive dealings together; the plaintiffs making consignments of American produce

(a) The Judges of this Court, sat in obedience to the King's warrant to B., arrived issued last term, from the 14th to the 18th February inclusively.

A., a native of America, and B., a native of Engings by mutual consignments 1812. In *June*, 1812, war was declared between the two countries, and ber, 1814, prepeace were signed at Ghent. A cargo of goods consigned on account, by A. in England in

1826.

November, 1814, and were sent by B. to France, and there sold, and he received bills for the amount, which he got discounted. Another cargo, so consigned, arrived in England in January, 1815, and was sold by B. before the 15th February. In March, 1815, B. became bankrupt, and was appointed by his assignees their agent to wind up his affairs; in the course of which employment he received the proceeds of the second cargo, and transmitted accounts to A, in which he admitted A to be his creditor for a balance in respect of the proceeds of both cargoes. In an action by A against the assignees of B to recover such balances:—Held, that A was entitled to prove under B's commission for the balances due to him upon the second cargo, only.

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OGDEN v. PEELE.

to Waddington, upon sale; and Waddington making remittances to the plaintiffs, paying money to the order of the plaintiffs in this country, and shipping consignments of goods to them on their account. In June, 1812, war was declared between the two countries; and on 24th December, 1814, preliminaries of peace were signed at Ghent. On 9th February, 1815, Waddington transmitted to the plaintiffs at New York, a statement of the account between them, commencing, on the credit side of the account, with 1st January, 1814, and made up to 1st January, 1815; by which account it appeared, that, on the latter day, there was a balance remaining in the hands of Waddington in favour of the plaintiffs of 7,093l. 11s. 2d.; and upon the debtor side of the account, after striking the balance above mentioned, several bills of exchange, drawn by the plaintiffs upon Waddington, and which had been accepted by him, but had not then arrived at maturity, were entered short, amounting in the whole to 15,0201. 18s. 2d. A letter from Waddington to the plaintiffs, dated London, 9th February, 1815, accompanied the said accounts; in which, amongst other things, he wrote as follows:--" We observe the various bills you have drawn upon us, which we have honoured, and we have noted them in your account current for last year, the balance being 7,093l. 11s. 2d., at your credit cash 1st Janu-Between 11th February, 1815, and 9th Murch in that year, Waddington paid certain of the bills specified at the foot of the last account, to the amount of 5,7801. 18s. 2d. On 25th March, 1815, a commission of bankrupt was duly issued against Waddington, upon which he was found and declared a bankrupt, and the defendants were afterwards duly chosen his assignees, and an assignment executed to them in due form of law. After the bankruptcy, the assignees employed the bankrupt as their agent for the purpose of managing and winding up the affairs of his estate; and on 15th July, 1815. the bankrupt, in the course of such employment, trans-

#### EASTER TERM, SEVENTH GEO. IV.

mitted to the plaintiffs two further statements of accounts. The one of them dated London, 25th March, 1815, was entitled as follows:—"Account sales of 724 bales cotton, per Joachim Feischel, from Amelia island, consigned to Henry Waddington and Co., for account of Joshua Waddington, three-tenths, Rutgers and Seaman, three-tenths, Abraham and C. L. Ogden, three-tenths, Francis Depan, one-tenth;" and after stating the nett proceeds of that stale to be 18,3111. 2s. 6d., the account proceeds to divide them amongst the several persons interested in the same, and gives credit to the plaintiffs at the foot for their share, as follows: - To credit, Abraham and C. L. Ogden, three-The earliest item in the account tenths. 5.4931. 6s. 9d." was on the debit side, and was under date the 1st January. 1815. The other account so furnished was a debtor and creditor account between the plaintiffs and the bankrupt, commencing on the 1st January, 1815, and made up to 16th July in that year. The debit side of this account was composed partly of the said bills so as aforesaid paid by Waddington on account of the plaintiffs, to the amount of 5,7801. 18s. 2d., and partly of other payments and disbursements made by the bankrupt for the use of the plaintiffs, between 1st January and 15th July, 1815, amounting together with the said bills to 9,068l. 17s. 6d.; and the credit side thereof was composed of the said balance of 7,0931. 11s. 2d., brought down from the former account of certain cash receipts on account of the plaintiffs, and interest, and of the sum of 5,2281. 13s. 1d., being therein called three-tenths of the proceeds of cotton by the ship Joachim; and the balance of this account between the parties, brought down to the 15th July, was 8,404l. 10s. 10d. in favour of the plaintiffs. There was a memorandum at the foot of the said last-mentioned account, in which the bankrupt states, that "the cotton per Benjamin, ditto per For, ditto per Porcupine, were uncertain." The proceeds of

1826. OGDEN v. PRELE.

the cotton per Fox and Porcupine are not in dispute, having

### CASES IN THE KING'S BENCH,

OGDEN v. Peele.

of the Benjamin subsequently came to the hands of the bankrupt whilst acting as such agent to the assignees; and in a letter from him to one Isaac Ogden, the brother and agent to the plaintiffs, dated the 9th October, 1815, he states the nett proceeds of that share of the Benjamin to which the plaintiffs were entitled, to amount to 2,8711.95. 2d., and at the same time corrects an error that had occurred in the account current of 15th July, in which the plaintiffs' share of the proceeds of the cotton per Joachim had been stated at 5,2281, 13s. 1d., instead of the real amount of 5,493l. 6s. 9d. No advances or payments have been made in favour of the plaintiffs since the date of the said account in July, 1815. The Joachim arrived at Falmouth in the first week in November, 1814. her cargo was landed in England; but Waddington, on the 9th of the same month, sent her to Messrs. Martin, Lafitte, and Co., of Havre, for sale on commission, and under a previous arrangement with the agent in London, drew upon them on account of the cargo, four bills of exchange, amounting to 448,000 francs, equal at the then rate of exchange, to 20,000l. sterling, all which bills were dated 4th November, 1814, and were made payable three months after date; and which bills Waddington remitted to Peregeaux and Co., of Paris, bankers, in order that they might get them accepted, and then discount them. Peregeaux and Co. accordingly got the bills accepted; and after deducting 5 per cent. on the amount for discount, remitted for the same to Waddington, various bills on London, some at three months date, and some at shorter periods. tin, Lafitte, and Co., of Havre, in their account current with Waddington, debit him with his bills upon them for 448,000 francs, as due 4th February, 1815, against the nett proceeds of such part of the cargo of the Joachim, as they had sold; but they take no notice in their account of any of the remittances which had been made him by Peregeaux and Co., those being included in a distinct account between Peregeaux and Co. and Waddington. On 15th

#### EASTER TERM, SEVENTH GEO. IV.

1826. OGDEN v. PEELE.

December, 1814, Lafitte and Co. sold 450 bales, and on 24th of the same month, 100 bales, (being the whole sold by them), part of the cargo; but they did not receive payment for such sales until 30th April and 13th May, 1815. In the same month of November, Waddington contracted with Messrs. Chadwick and Seddon, of Manchester, for the sale of part of the Joachim's cargo, which part, consisting of 274 bales, the remainder of the cargo, was reshipped by Lafitte and Co., at Havre, in January, 1815, arrived at Liverpool on the 4th February, 1815, and was delivered on 8th and 10th of the same month, to the purchasers, who then paid Waddington by bills at usual periods of ten days and three months. The advances made as above by Lafitte and Co., exceed the nett proceeds of the cargo, which ultimately produced 18,311l. 2s. 6d. only. The Benjamin arrived at Liverpool direct from America, addressed to Waddington's agents there, on 1st January, 1815, and the cargo was sold between 7th January and 15th February. Remittances were made to Waddington on account of such sales, on 21st and 28th January, and the sales were finally closed, and the amount thereof carried to Waddington's credit, by his agents at Liverpool, who transacted the business, on 4th March, 1815. The several accounts and letters and documents referred to in this case, accompany it, and are considered as forming part thereof. The questions for the consideration of the Court are: first, whether any debt, or if any, to what amount, is proveable by the plaintiffs, under the commission of bankrupt issued against Henry Waddington. Second, whether any debt would have been proveable, if there had been no ratification or acknowledgment subsequent to his bankruptcy.

Tindal, for the plaintiffs. First, the whole balance due to Messrs. Ogden, namely, 11,540l. 13s. 8d., is proveable as a debt under Waddington's commission. [Abbott, C. J. It appears by the case, that the proceeds of the Benjamin came to the hands of the bankrupt whilst he was acting as

1826. OGDEN v. PERLE.

agent to the assignees; then should not the action have been in assumpait for money had and received by the assignees to the use of the plaintiffs? Bayley, J. The same difficulty presents itself to my mind. The cargo of the Benjamin was sold by Waddington in February, and the balance of the proceeds was carried to his credit on the 4th of March, but the bills were not turned into cash before his bankruptcy]. The whole balance due to the plaintiffs is thus composed: 8,4041. 10s. 10d., the balance admitted to be due to them in the account made up to July, 1815; 264l. 13s. 8d., the amount of the error in the account of the Joachim's proceeds, also admitted to be due to the plaintiffs by Waddington's letter of the 9th of October 1814; and 2.8711. 9s. 2d., the nett proceeds of twofifths of the Benjamin's cargo, also admitted to be due to them; amounting together to 11,540l. 13s. 8d. With respect to the latter item, the question will be, whether that was a debt contracted during the existence of war between this country and America, or after peace had taken place; for in the former case it certainly would not be proveable. Now the plaintiffs' cause of action arose when the proceeds of the Benjamin's cargo reached the hands of the bankrupt, and not before; and the dates of the several transactions as stated in the case, shew that the balance became due to the plaintiffs after peace had been renewed, because then, and then only, did the bankrupt receive the proceeds in cash. The Benjamin arrived at Falmouth before the war ceased; from thence she went, on that account, to Haure, where her cargo was put into the hands of Lafitte and Co., and it was sold while lying there; Waddington having previously drawn hills to the. value of the cargo upon them at three months date, which became due after the war had ceased. It is true that he discounted those bills with Peregeaux and Co., at Paris, but that cannot vary the plaintiffs' claim, because that was a private transaction of Waddington's, over which they could have no control. [Bayley, J. Would Waddiagton himself under those circumstances have been liable to the plaintiffs in an action for money had and received?] Certainly he would, for the cargo was sold after the cessation of hostilities. [Abbott, C. J. Part of it was sold during the continuance of hostilities; that which was sold by Lastte and Co.]. But that part was paid for by bills at three months date, which became due after peace was restored, therefore the money did in fact reach the hands of Waddington during a time of peace, and the plaintiffs could not have sued him for it till that time, for till then they had no complete cause of action. The residue of the cargo, was sold in this country by Waddington himself, under a contract made in November, 1815, was delivered to the purchasers in February, 1816, and was paid for by bills falling due in April and May; consequently, the entire proceeds of the cargo were received by Waddington after the war had ceased. Bayley, J. But, in pursuance of a bargain made during the war, and therefore illegal]. In pursuance of a bargain, certainly, but not an No case upon this subject has gone further illegal one. than to hold, that no action will lie by a native of a foreign country, against a native of this country, to enforce a contract made between them during a time of war; it has never yet been held, that an action brought for a debt which accrued due in time of peace, though arising out of a contract made in time of war, but ratified after war had ecased, cannot be maintained. The first case which even went the length first pointed out, was what of Anthou v. Fisher (a), where it was decided, that an alien enemy cannot, by the municipal law of this country, sue for the recovery of a right claimed to be acquired by him in actual war; and which overruled the case of Ricord v. Bettenham (b), decided only a few years before, where it was held that an action was maintainable by an alien enemy upon a ransom bill. Brandon v. Nesbitt (c), Bris-

OGDEN 0. PEELE.

<sup>(</sup>a) 2 Doug. 648, 649, in notis. (b) 3 Burr. 1734: 1 Bl. 563. (c) 6 T. R. 23.

### CASES IN THE KING'S BENCH,

OGDEN v. PEELE.

tow v. Towers (a), and Potts v. Bell (b), are all authorities in support of the doctrine laid down in Anthou v. Fisher, and it must he admitted that the principle upon which they were founded is as just, as the policy which they were intended to advance is sound. In Brandon v. Nesbitt, however, though the Court said that they had not found a single case in which the action had been supported in favour of an alien enemy; they added, that though it was held in Ricord v. Bettenham, that the action by an enemy on a ransom bill might be maintained, the action was not brought until peace was restored, which gets rid of the objection. Now here, not only the action was not brought till after peace was restored, but it was impossible that it should be, for not till then did the cause of action arise. No injury therefore can be sustained in a national point of view by the allowance of such an action, because there has been no transfer or interchange of property during the war, and no claim attached to either party till after the restoration of peace, inasmuch as till then no one of the contracts of sale was complete. The goods were not finally delivered to the purchaser till after the restoration of peace, but they were sold, some of them at least, during the continuance of the war]. The contract was not complete till after peace was restored, and then such a contract will support an action; the rule has never yet been carried farther, and the Court will not now extend it, particularly where manifest injustice must be the result of so doing, as it would be here, for the plaintiffs are in equity entitled to this money, and at any rate Waddington, or his assignees, can have no possible right to retain it. [Bayley, J. Does not the original illegality of the transaction render it void in all its subsequent parts? That appears to me to be the only question]. dently submitted that it does not, and there are many cases which seem to warrant the position. It has been held that an agent cannot set up the illegality of the con-

### EASTER TERM, SEVENTH GEO. IV.

tract, in defence of an action for money had and received by his principal; Tenant v. Elliott (a). The illegality there set up was grounded on a particular statute, but the principles laid down by the Court were broad and general. Buller, J., said, "Is the man who has paid over money to another's use, to dispute the legality of the original Having once waived the legality, the consideration? money shall never come back into his hands again. Can the defendant then in conscience keep the money so paid? For what purpose should he retain it? To whom is he to pay it over; who is entitled to it but the plaintiff?" And Eyre, C. J., added, "the defendant is not like a stakeholder. The question is, whether he who has received money to another's use on an illegal' contract, can be allowed to retain it, and that not even at the desire of those who paid it to him. I think he cannot." Waddington was an agent, and stood precisely in the situation of the defendant in that case; the cases, there-But Waddington, by the accounts fore, are parallel. which he rendered after the restoration of peace, admitted that the plaintiffs had a cause of action against him, and upon that ground his estate is liable to this debt. This must be considered in the same light as if it was an action for money had and received against him. Then the question of the illegality will still remain]. Doubtless it will, and therefore it is contended that the subsequent admission of Waddington purges the supposed illegality, and makes him liable at all events; as in Barnes v. Hadley (b), where it was held, that "after usurious securities given for a loan have been destroyed by mutual consent, a promise by the borrower to repay the principal and legal interest is founded on a sufficient consideration, and is binding." [Bayley, J. That was on the ground that there was a good moral consideration for the second promise: that there was, in fact, a new contract, which purged the illegality of the former]. Here also there is a

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moral consideration, and in effect a new contract. [Abbott, In that case the debt was void, here it is illegal; those are distinct terms: besides, there the debt was void upon a statute passed for the benefit of individuals; here it is illegal, as being against public policy]. The distinction between void and iflegal seems difficult to be comprehended, for a debt can only be void because it is illegal. Duhammel v. Pickering (b), is another authority in favour of the plaintiffs. [Bayley, J. There the defendant was probably a prisoner in a foreign country, and while in that situation drew the bills; under those circumstances, he was still at liberty to enter into a contract, and might bind himself, if he chose. Besides, there the money was actually advanced, and a debt really created in France; then clearly, after peace was restored, a fresh promise to pay was binding. It seems to me, that there never was any illegality in that transaction, from first to last. toine v. Morshead (b), is another case to the same effect, but they do not appear to me either of them to touch the present]. There are no other authorities that bear upon the point. The rule, so far as it has already been laid down, is sufficiently severe, and the Court will not extend its operation. There is nothing in the plaintiffs' claim, opposed either to morality or to public policy; and the justice of the case is, that they should be entitled to prove their debt.

F. Pollock, for the defendants. No part of this debt is proveable under the commission, because there is no consideration, either express or implied, to support it in a court of law, nor any equitable ground, upon which the creditors could obtain relief in a court of equity. The only question in this case, is, whether there is any consideration, upon which an express contract can be sustained, or an implied contract can be raised, by law. Out of an illegal transaction no legal right can arise.

(a) 2 Stark. 90.

(b) 6 Taunt. 237. 1 Marsh 558.

That is a general and established rule of law, and the decision in Tenant v. Elliott forms no exception to it; for there the question of consideration was excluded, none being necessary to support that action. But where a consideration must be shewn, in order to support the action, if there appears to be any thing illegal in the origin of the transaction, the contract founded upon it cannot be enforced at law. Where it is not necessary to shew a consideration, a party who receives money for the use of another, is bound to pay it over at all events, because he is merely an agent or banker, and has no right to set up the illegality of the transaction as an excuse for retaining the money. Neither do the cases of Antoine v. Morshead, and Duhammel v. Pickering, at all affect the present, because there the transactions were held to be good, upon the ground of necessity. The distinction between road and illegal, is well founded and important. For instance, the Statutes of Usury prohibit the lending money for. more than 51. per cent. interest, and declare that contracts for loans upon any higher rate of interest shall be void, and that the parties receiving such rate of interest shall be subject to certain penalties: but they do not prevent the lender from receiving the legal interest even upon the original loan, if the borrower gives a subsequent promise. to pay it, and therefore they do not make the whole transaction ab initio illegal, because if it were so, no fresh undertaking could be grafted on it. But the common law. has declared the act of trading with an alien enemy to be absolutely illegal, in toto, and therefore every contract and promise founded upon such a trading, is not only void, but illegal also, and cannot, at any period, on under any circumstances, be enforced at law. Potts v. Bell(a): The case of the Hoop (b); Ex parts Bousmaker (c); Flindt v. Waters (d); Evanz v. Richardson (e). The case

last cited applies strictly to that portion of this debt which.

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<sup>(</sup>a) 8 T. R. 548.

<sup>(</sup>b) Robinson's Adm. Rep. 196.

<sup>(</sup>c) 13 Ves. 71.

<sup>(</sup>d) 15 East, 260.

<sup>(</sup>e) 3 Meriy. 469.

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is claimed in respect of the cargo of the Benjamin, and is an authority for saying, that that is equally irrecoverable with the rest. [Abbott, C. J. The Benjamin did not sail under any pre-existing contract in respect of her, made during the war]. Certainly not, but the parties had had general dealings and transactions during the war, and the Benjamin must be regarded as mixed up with them. In Evans v. Richardson, it was held, that the general intention of the parties to do that which must be in violation of the law, rendered every contract subsequently made illegal; and in that point of view, the transaction respecting the Benjamin was clearly illegal, and cannot be enforced. That vessel indeed arrived at Liverpool after the preliminaries of peace had been signed; but as she commenced her voyage under an illegal contract, and with an illegal intent, that made no difference. She was liable to capture at the moment of her arrival, and might have been seized as a prize in the port of Liverpool. [Bayley, J. I should doubt that. Hostilities had ceased when she arrived. Littledale, J. Surely she might have been entered on the books of the Custom House]. She arrived in prosecution of a contract made with an alien enemy, and in the actual course of trade with an alien enemy; that contract, therefore, was illegal and void, and the Court cannot imply a new contract made after the cessation of hostilities. plaintiffs could not have maintained trover for the goods, nor for the bills received in payment for them; for an alien enemy has no property in goods or bills placed in the hands of a subject of this country, under such circumstances, either during the war, or after it has ceased. The present defendants, therefore, as the assignees of Waddington, are bound by law not to allow the plaintiffs to prove this debt, but to divide the money among the English creditors; and, as was held in Evans v. Richardson, even, if they had not raised the objection, the Court would, as a matter of law, have raised it for them. The plaintiffs rely upon the last account rendered by the bankrupt, as an admission at that time, that he was liable for this debt. But, taking it to be such an admission, what is the legal effect of it? It can merely go to shew how the transaction stands as a matter of account between the parties; it cannot legalise one item in the account, nor the contract, in the execution of which the account arose. Then as the original liability was discharged, and the bankrupt's admission does not operate to revive it, neither can the Court interfere to imply a new promise, and to set up a new liability; Cannan v. Bryce (a). Then are the defendants, in their character of assignees, bound by any thing that has occurred since the bankruptcy? Clearly Even if the bankrupt could bind himself by any new promise made since the peace, he still could not bind his estate or his assignees, by any act done since his bankruptcy. Upon these grounds, it is contended, that no part of this debt is proveable by the plaintiffs under the commission issued against Waddington.

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Tindal, in reply. With respect to the Benjamin, a fact has been imported into the case in argument, which is not to be found there, namely, that she sailed under an illegal contract. The Court will not presume such a fact, in order to vitiate a contract apparently good; and in the absence of such a fact, the whole train of argument on that point utterly fails. As to the general principle, no case has ever yet decided that the foreign merchant has no claim upon his consignee in this country, for the proceeds of his goods after hostilities have ceased; for though Evans v. Richardson seems, at first sight, to warrant that position, it does not, in fact, do so; because, though it was there held, that the foreigner could not recover, even after the restoration of peace, it was upon the ground that the plaintiff there relied on the original contract; which the present plaintiffs do not. On the other hand, the case of Tenant v. Elliott seems not to be distinguishable

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defendant, who was an attorney, for that purpose. defendant said he knew two gentlemen near Gloucester, who would take the money; and he accordingly introduced the plaintiff to the Messrs. Olive, who were at that time in credit, and were considered as respectable persons.-The money was accordingly advanced to them, and they executed the warrant of attorney and mortgage, as stated in the declaration; and they continued in credit, and regularly paid the interest up to the month of October, 1820. In November, 1820, R. Olive died, and in the following month J. Olive became bankrupt, and shortly afterwards died also. Upon this it was discovered that the greater part of the lands mortgaged by Messrs. Olive to the plaintiff did not belong to them; and that such part as did belong to them fell very short in value of 3000%. The plaintiff had received no interest since October, 1820, and had never recovered any principal. The present action was commenced in Michaelmas term, 1824, and the question was, whether it was not barred by the plea of the Statute of Limitations. The counsel for the plaintiff contended that it was not. They cited Roberts v. Read (a), and Gillon v. Boddington (b), and relied upon them as deciding, that in actions on the case, the statute runs from the time when the damage accrues only; and they insisted that the damage in this case did not accrue till October, 1820. when the payment of the interest ceased. They further relied upon Bree v. Holbeck (c), as deciding, that in cases of fraud, the statute runs from the time of the discovery of the fraud only, and contended, that as fraud was alleged in this declaration, the case came within that principle.— The learned Judge, upon the first point, was clearly of opinion that the damage accrued at the time of the negligence complained of, and not at the time of the default in payment of the interest, and cited Short v. M'Carthy (d), as in point; upon that point, therefore, he decided against the

<sup>(</sup>a) 16 East,215.

<sup>(</sup>b) 1 Car. 541.

<sup>(</sup>c) 1 Doug. 130.

<sup>(</sup>d) 3 B. & A. 626.

plaintiff: the second point, he said, was, in his opinion, proper to be left to the jury. His lordship then left it to the jury to say, whether the defendant had been guilty of any fraud, directing them, if they thought he had not, to find a verdict in his favour; and, if otherwise, to find for the plaintiff. The Jury found for the defendant.

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Curvood, in Michaelmas term last, obtained a rule nisi for a new trial, upon the ground of mis-direction by the learned Judge, and renewed both the points insisted upon at the trial.

Taunton, Ludlow, Campbell, and Cross, now appeared to shew cause; but the Court called upon

Maule and Carrington (with whom was Curwood), in support of the rule. Wheatley v. Stone (a), and Scott v. Shepherd (b), are authorities to shew that in some cases a plaintiff may bring his action, either in trespass or in case, at his election; which can be only upon the principle, that he may waive the original trespass, and resort to the consequential damage. So in Slades' case (c), there are instances put in which a party may have an action either of assumpsit, or of debt, at his option, although the defendant may thereby lose his wager at law; and it is said that in all cases when the Register has two writs for one and the same case, it is in the party's election to take either. In the present case, therefore, the plaintiff had the privilege of waiving his action of assumpsit for the breach of promise, and bringing his action on the case for the damage consequent upon that breach of promise, although by so doing he ousts the defendant of his plea of the Statute of Limitations; which it is contended he clearly does. The declaration undoubtedly charges the defendant with a breach of duty, but the real cause of action is, not that breach of duty, but the damage conse-

<sup>(</sup>a) Hob. 180. (b) 2 Bl. 892, 3 Wils. 403. (c) 4 Rep. 92 b. VOL. VIII. C

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quent upon it, and, therefore, the Statute of Limitations did not begin to run till the period when that damage The plaintiff had the personal security of the accrued. Messrs. Olive, as well as the mortgage; and though the mortgage proved to have been bad from the first, the personal security was good at the time of the loan, and continued so down to October, 1820; therefore, he had no complete cause of action till that time, when default was first made in the payment of the interest. For this position, the recent case of Hawkins v. Howard, (a), seems an authority. The plaintiff was not in the situation of one who may sue quia timet, for there are only "six writs in law, that may be maintained quia timet" (b), and none of them was applicable to his case. It was decided, in Roberts v. Read (c), and the decision was recognised and acted upon, in the very recent case of Gillon v. Boddington (d), that where an action is brought for consequential damages, arising from an act done, the period within which the action is to be brought is not to be calculated from the time of the doing of the act, but from the period when the consequential damage arises; and this case falls directly within that rule, for the consequential damage, for which the action is brought, arose within six years before the commencement of the action. [Bayley, J. There is this distinction between those cases and the present: there the act done furnished no complete cause of action; the cause of action became complete only when the consequential damage arose: here the original negligence, in taking the insufficient security, was a complete cause of action in itself, from the first moment]. No damage accrued until the interest became in arrear; and there was no cause of action until a damage had accrued. As to the cases of Battley v. Faulkner (e), and Short v. M'Carthy (f), they were actions of assumpsit, and the decisions

<sup>(</sup>a) 1 Carr. 222. (b) 1 Inst. 100 a.

<sup>(</sup>c) 16 East, 215.

<sup>(</sup>d) 1 Carr. 541.

<sup>(</sup>e) 3 B. & A. 288. (f) 3 B. & A. 626.

there strongly corroborate the present argument, because they establish the distinction between actions on the case and actions of assumpsit, with reference to the Statute of Limitations; that distinction being that the consequential damage is the cause of action in the first, and the breach of the promise in the last; and that in the first the statute, consequently, runs from the period when the damage acerues; and, in the last, from the period when the promise is broken. Howell v. Young.

BAYLEY, J.—I entertain no doubt upon this case. The cause of action set out in the declaration, is the alleged misconduct of the defendant. The declaration states that the plaintiff retained the defendant to do certain work for him, and that it was the duty of the defendant to ascertain that certain securities were good; that the defendant neglected his duty and falsely represented the securities to be good, whereas they were, in fact, bad; and that the plaintiff advanced his money upon those bad securities, and thereby lost it. Now the mere statement of the defendant's acceptance of the retainer, and of his breach of the duty thereby imposed upon him, would have formed a perfect count, and constituted a good cause of action. and would have entitled the plaintiff, upon proof of those facts, to recover, without any allegation of special damage. The cause of action, both in fact, and as stated in the declaration, is the breach of duty; and the allegation of special damage cannot vary it, because that is not the gist of the action, but is merely the natural consequence of the previous injury; and though it might properly enough be stated, and given in evidence, for the purpose either of explaining or aggravating the nature of that previous injury, it does not in itself constitute a new and independent cause of action. In an action for words in-themselves actionable, where the declaration states first the speaking of the words, and then that by means thereof the plaintiff sustained special damage; what is considered

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to be the cause of action? Clearly, the speaking of the words; the subsequent matter is only by way of explaining the manner in which the previous injury occasioned damage, and of measuring the damage so occasioned. this were an action of assumpsit, it is admitted that the Statute of Limitations would run from the time of the breach of the promise, and not from the time when the damage accrued; and I am at a loss to conceive, upon what principle a different rule should prevail in an action on the case; the only difference being, that in the one the cause of action is the breach of a promise, and in the other the breach of a duty. The case of Short v. M'Carthy (a) appears to me perfectly analogous to the present in principle, and decisive of it. There the declaration in assumpsit, stated as a breach, that the defendant did not diligently and sufficiently make search at the Bank of England, to ascertain whether certain stock was standing in the names of certain persons, he having been employed as an attorney so to do. The omission to search took place more than six years before action was brought, although it was not discovered by the plaintiff till within the six years; and it was held that the Statute of Limitations, which was pleaded, run, not from the time of the promise, but from the time of the omission to search, and was a bar to the action. I cannot see any real distinction between that case and the present, or between an action of assumpsit and an action on the case, generally, where the cause of complaint is a breach or neglect of duty; and it would, in my opinion, be a monstrous anomaly, if the Statute of Limitations were a bar in the one, where the law raises the duty and the promise, and not in the other, where the action proceeds on the duty itself. I am clearly of opinion, that framed as this declaration is, the gist of the action is the original negligence of the defendant, and not the consequential damage resulting from it; and therefore that the statute runs from the period of that

negligence, which being more than six years before action brought, the plea of the statute is a bar to the action.

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HOLROYD, J.—I am of the same opinion. The negligence is the cause of action; and that having occurred more than six years before the action was commenced, the statute is a bar, unless the consequential damage, the loss of the interest, raised a new cause of action, which I think it did not: it merely operated as a measure of damages. distinction has been taken between actions of assumpsit and actions on the case; but in cases like the present, the cause of action, the original negligence, is the same, whichever of those two forms may be adopted: and the decisions in the cases of assumpsit apply, upon that very principle, to cases of tort. The case of Fetter v. Beale (a), seems to me to illustrate this position, and to distinguish the present case from that of Roberts v. Read(b), and Gillon v. Boddington (c), so much relied on for the plaintiff. That was an action for an assault; the plaintiff had recovered damages for the assault in a previous action, and afterwards a piece of his skull came out, and he brought a fresh action. Now, if that consequential damage had constituted a new cause of action, the plaintiff would have been entitled to recover in the second action; but the Court held that he could not. It was urged that the subsequent damage was a new matter, which could not be given in evidence in the first action, when it was not known; and it was compared to the case of a nuisance, where every new dropping is a new act. But Lord Holt said;—" Every new dropping is a new nuisance, but here is not a new battery; and in trespass the grievousness or consequence of the battery is not the ground of the action, but the measure of the damages, which the jury must be supposed to have considered at the trial." So here, there was no new negligence. If an action had been brought before default was made in the payment of the

<sup>(</sup>a) 1 Salk. 11.

<sup>(</sup>b) 16 East, 215.

<sup>(</sup>c) 1 Carr. 541.

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interest, the probable loss of the interest would have been part of the measure of the damages, and might have been taken into consideration by the jury as such: and if the plaintiff had recovered in such an action, the subsequent loss of the interest would not have constituted a new cause of action. It seems to me, therefore, that the defendant has made out his plea of the Statute of Limitations, and that that plea is a bar to the action.

LITTLEDALE, J. was gone to chambers.

Rule discharged (a).

(a) See Palmer, 529; 1 Sid. 95; Doug. 630; 3 P. Wms. 143, 4; 8 T. R. 335; 12 East, 452; 2 B. & B, 73, 372; 2 Marsh. 485; and Ante, vol. iii. 322.

### WHITCHER v. JAMES HALL.

A contract by A. to let, & by B. to take, the milking of 30 cows, at 7l. 10s. per cow, per annum, from 14th February, the rent to be paid quarterly, in advance, and by C. to pay the rent; is an entire, and not a divisible contract.

In such a contract C. is a mere surety, and in an action against himfortherent, A. must prove a literal performance of the contract on variation made

ASSUMPSIT. The first count stated, that by articles of agreement made 4th February, 1824, between plaintiff of the one part, and one Joseph Hall and defendant of the other part; plaintiff agreed to let, and Joseph Hall agreed to take, the milking of thirty cows, at 71. 10s. per annum, to commence from 14th February, then instant, agreeably to the conditions thereinafter specified, that is to say:one quarter's rent to be paid on the said 14th February, and the succeeding quarters on 14th May, 14th August, and 14th November; either party to be at liberty, by notice, to determine the agreement previous to the 14th November; otherwise that Joseph Hall should continue to hold from year to year, until such notice should be given. That defendant thereby agreed to pay the said rent, and thereupon, in consideration thereof, and that plaintiff, at the instance of defendant, had promised to perform the agreement on his part, defendant promised to perform it his part. Any on his part. That afterwards Joseph Hall took the milk-

in such a contract by A. and B., without the consent of C., discharges the latter, though his risk is not thereby increased. Per Bayley and Holroyd Js.; Littledale, J., dissentiente.

ing of the said thirty cows, and held and enjoyed the same until the 14th of November, 1824; and that although plaintiff had performed the agreement on his part, defendant had failed in performance, and had not paid the rent. Second count, for the milking of other cows, stated to have been held and enjoyed by Joseph Hall, at the instance of defendant. Plea, non assumpsit, and issue thereon. At the trial before Littledale, J., at the last Hampshire summer assizes; the agreement being produced, stated that Joseph Hall was to have thirty cows for the dairy year, but the evidence shewed that the agreement had not been literally performed in that respect. It appeared that on the 14th of February, when the taking commenced, only ten of the cows had calved; that to supply the loss thus occasioned, the plaintiff, about March, added two cows; that shortly after that two cows slipped their calves; that in June one cow died, and was never replaced; that in October, the plaintiff, with the consent of Joseph Hall, took away one cow, and afterwards, in the course of the same month, three others; and that, upon the average, Joseph Hall had the use of only twenty-eight cows, instead of thirty. These deviations from the agreement were all made with the consent of Joseph Hall, but were all unknown to the defendant, who lived at a distance. It was contended on the part of the defendant, that the action was not maintainable, first, because there was a variance between the agreement declared upon, and that given in evidence; and, second, that the defendant being only a surety for Joseph Hall, and the agreement having been deviated from without his knowledge or consent, he was released from all liability under it. The learned Judge overruled these objections, but reserved the points; and the plaintiff obtained a verdict for the amount of the rent for so many cows as Joseph Hall actually had, with liberty for the defendant to move to enter a nonsuit: and a rule nisi having been obtained accordingly,

Merewetker, and E. Lawes, now shewed cause. The

WRITCHEN V. Hall 1896. WHITCHER V. HALL. first question is, whether the defendant was a principal or a surety, quoad the agreement. He was clearly a principal. The cows were let to Joseph, but at the request of the defendant, and probably for his use and benefit; and the defendant expressly and absolutely agreed to pay the rent for them. That constitutes him a principal; and all the facts of the case agree in shewing that Joseph stood in the situation of agent to the defendant, instead of the defendant standing in the situation of surety to Joseph. But, secondly, even if the defendant be a surety merely, and not a principal, still he is not released by the alterations made in the contract, even though made without his knowledge or consent. Those alterations were extremely slight, and perfectly immaterial to the real substance of the contract; they did not tend to diminish the profit to be gained by Joseph, nor to increase the risk to be incurred by the defendant: therefore, they did not vary the original situation of the parties, and could not operate to release the defendant.

C. F. Williams, and R. Bayly, contra. The defendant was a mere surety, and not a principal. He took no beneficial interest under the agreement, nor could he by possibility derive any benefit from it. He merely undertook to pay the rent, upon certain conditions; those conditions have been infringed by the alterations made in the agreement by the plaintiff and Joseph, without the defendant's knowlege or consent: therefore, his undertaking is waived, and his liability gone. Whether the alteration of the agreement tended to the advantage or disadvantage of the defendant, or was calculated to increase or diminish his risk, is perfectly immaterial; no one is entitled to decide that question but the surety himself, and the Court are not at liberty to entertain it. If it is once held, that a contract may be varied behind the back of the surety, there will be no limits to questions of this kind, and it will be impossible to draw any precise line by which they can be answered. The surety is the only person to answer

such a question; though all the world may concur in thinking the alteration beneficial to him, he may be of the opposite opinion, and he has a right to be consulted, to form his own judgment, and to act accordingly. cases upon this point are numerous and decisive. Barker v. Parker (a), it was held that a bond with a condition that a clerk should faithfully serve and account for money to the obligee, did not make the obligor liable for money received by the clerk in the service of the obligee's In Pidcock v. Bishop (b), where a surety gave a guaranty to A, for goods to be sold to B, and by a secret agreement between A. and B., the latter consented to pay more than the market price of the goods, in satisfaction of an old debt; it was held that this was a fraud upon the guarantee, and discharged his liability. In Lewis v. Jones (c), where a creditor signed an agreement to accept a composition for a debt, on having a joint note from the debtor and his father for the composition: it was held that this was an accord and satisfaction of the original debt, and that the indorser of a note by which the debt was originally secured, could not be sued for the residue of the debt. These are decisions of this Court, and there are equally strong decisions upon the point in Equity. In Rees v. Berrington (d), it was laid down as law, that any change, either of the party, or the subject matter, to which the liability of a surety applies, must have the consent of the surety; and it was held, that the obligor, as surety in a bond, was discharged by time having been given to the principal. In Eyre v. Bartrop (e), which was the case of an annuity, the surety was, upon the same principle, held to be discharged from all future as well as all past arrears. And in Samuel v. Howarth (f), the guarantee for the payment of the price of goods was held to be discharged by

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<sup>(</sup>a) 1 T. R. 287.

<sup>(</sup>d) 2 Vesey, jun. 540.

<sup>(</sup>b) Ante, vol. v. 505.

<sup>(</sup>e) 3 Madd. 122.

<sup>(</sup>c) Ante, vol. vi. 567. 4 B & C.

<sup>(</sup>f) 2 Meriv. 272.

<sup>506.</sup> 

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the creditor giving time to the debtor, although the act of giving him time might have been beneficial to the guarantee; and the Court refused to entertain that question, assigning as the reason, that the guarantee was the proper person to decide it, and was entitled to judge for himself. [Littledale, J. It was held in Davey v. Prendergrass (a), that it is not any defence at law to an action on a bond against a surety, that by a parol agreement time has been given to the principal]. That case involved a mere question of pleading, and does not, therefore, apply to the present; besides, the ground of the decision there was, the general rule of common law, which requires that the obligation created by an instrument under seal, shall be discharged by force of an instrument of equal validity. [Litfledale, J. There has certainly been a substantial performance of the original contract here, and that is sufficient to continue the defendant's liability, even if he is a surety: French v. Campbell (b). There bills were drawn by A., in England, on B., in India, payable sixty days after sight, and a bond was entered into, conditioned to be void, if the bills should be duly paid in India, or come back to England duly protested for non-payment, and the amount of them paid by the obligor within a certain time after they should be produced so protested. When the bills arrived in India, the drawers had left the place, and their agents refused to accept them. The bills were then protested in India for non-acceptance, and sent back to England so protested; and some of them being presented to the drawer for payment, were protested for non-payment In debt on the bond, the court of Common Pleas held, that for the bills returned protested for non-acceptance, and not presented and protested for non-payment here, the obligor was not liable; but for those which were protested for non-payment here, he was liable: this being a substantial performance by the obligee of his undertaking according to the condition of the bond]. That decision

of the Common Pleas was over-ruled in the King's Bench, in the subsequent case of Campbell v. French, in error (a).

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BAYLEY, J.-I am of opinion that the rule for entering a nonsuit in this case, ought to be made absolute. It seems to me clear, that the defendant was a surety, and a surety only. No part of the consideration moved to the defendant; the only consideration was the benefit to be derived by Joseph. The agreement was for the milking of thirty cows, to be let by the plaintiff to, and taken by Joseph; all that the plaintiff did was to undertake to pay the rent. Was this an entire, or a divisible contract? If it was entire, the defendant was entitled to insist that Joseph should have thirty cows, during the whole period of the hiring; but it appears he never had thirty: therefore the contract was never performed by the plaintiff, and in that view of the case he is precluded from maintaining this action. If it was divisible, the plaintiff might, no doubt, recover for so many cows as he supplied; provided there was no deviation from the original contract. I am of opinion that this was an entire contract; and if it was entire in its inception, the parties were bound so to continue it throughout its performance. Have they done so? Clearly not. A new bargain was entered into between the plaintiff and Joseph, to which the defendant was no party. for he was wholly ignorant of it; and that new bargain could be binding only on those who were parties to it. If it was intended to be binding on the defendant, it should have been communicated to him, and he should have been asked whether he chose to continue his liability. The new bargain may have produced no real difference in the profit, the risk, or the liability of any of the parties; but still the defendant, as a surety, was entitled to be consulted upon the subject, and to have an opportunity of exercising his own choice and judgment in the matter. The quantum of difference is not the question in the case:

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the question is, whether the new agreement is part and parcel of the old. If it is, the defendant is bound by it; if it is not, he is discharged: and it is just that he should be, for the plaintiff might have avoided the difficulty by consulting the defendant before he varied the contract. The case of Heard v. Wadham (a), seems to me to bear upon the present. There A. covenanted that he would, on or before a certain day, convey to B., by such conveyance as B.'s counsel should advise, certain lands; in consideration of which B. covenanted to pay money and reserve rents to A. It was held that A. could not maintain covenant against B., without averring such a conveyance, or a readiness to convey to B, on or before the day, all the lands, but that B. prevented him by some act or neglect of his. And, that it was not sufficient to maintain covenant, to shew, that after the day B. accepted a conveyance of ground rents in lieu of part of the land, and accepted that and a conveyance of the other part in lieu of the conveyance covenanted to be made by A.; for that was a substitution of a different agreement by parol, to which the covenant did not apply. What is the principle of that case? That the substitution of a new agreement, will not bind the parties to the old, which applies to this case, because here a new bargain has been . substituted for the old bargain. The same principle was recognised and acted upon by this Court, in reversing the judgment of the Court of C. P., in French v. Campbell. Undoubtedly, there have been cases, in which the question, whether the original contract has not been substantially performed, has been entertained, so far as ascertaining whether there was an equivalent in one form to the departure in another. But, the defendant here being a mere surety, those cases do not govern the present; because though the substituted contract, being accepted by the principal as an equivalent, may be binding on him, it still cannot bind the surety, unless made with his knowledge and consent. For these reasons I think the defendant in this case is discharged from all liability, and that the action cannot be maintained.

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HOLROYD, J.—I am of the same opinion. I consider the defendant as surety only for the performance of the original agreement. That was a contract for thirty cows, and was an entire contract. The defendant undertook to pay the whole rent for thirty cows, and the supply of thirty cows to Joseph Hall, was an entire consideration, and the only one, if any, moving from the plaintiff to the defendant. The expression of "71. 10s." per cow," does not make this a divisible contract, for that has reference only to the measure of the rent, not to the nature of the contract. Then, the original contract being entire, and the defendant being a surety for its performance, he is liable no further than his original engagement; and as a new contract has been substituted, without his knowledge or consent, he is relieved from that engagement, and discharged from all liability. The rule applicable to surrenders in law, is applicable also to the present case, namely, that the acceptance of a new lease, by parol, is a surrender in law of the former lease, although that former lease be by indenture: Com. Dig. Surrender, (I. 1). I agree, therefore, that a nonsuit must be entered in this case.

LITTLEDALE, J.—I was of opinion at the trial that the plaintiff was entitled to recover. I thought that the original contract had been substantially performed, for the variation introduced appeared to me in effect to be rather in furtherance than in violation of it. That variation seemed to me to be so trifling as to come within the maxim de minimis non curat lex, and therefore to present no obstacle to the plaintiff's right to recover. I am, after much consideration, of the same opinion now, though my deference and respect for the reasons expressed upon the subject by my learned brothers, cannot but make me

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doubtful about the propriety of my own. There seem to me to be two matters for enquiry here; first, what was the operation of the original agreement upon Joseph Hall, the principal; and second, what was its operation upon the defendant, the surety: for that he was a surety, and no more, I fully admit, and, consequently, I admit also that unless Joseph is still liable under that agreement, the defendant cannot be. The agreement is for the milking of thirty cows, at 7L 10s. per cow, per annum, and I think the expression, "per cow," renders this a divisible, and not an entire contract. It is said, that as the plaintiff never actually furnished the whole thirty cows, he has never performed the contract on his part, and is therefore not in a condition to maintain this action. If this is a divisible contract, that objection fails, and it seems to me, both upon principle and authority, that it is. All the cases bearing upon this point are collected and considered in that of Ritchie v. Atkinson (a), which appears to me to be a decisive authority in favour of the present plaintiff. There the master and freighter of a vessel of 400 tons, mutually agreed in writing that the ship, being every way fitted for the voyage, should with all convenient speed, proceed to St. Petersburg, and there load from the freighter's factors a complete cargo of hemp and iron, and proceed therewith to London, and deliver the same on being paid freight, for hemp 51. per ton, for iron 5s. per ton, &c.; one half to be paid on right delivery, the other at three months. It was held, that the delivery of a complete cargo was not a condition precedent; but that the master might recover freight for a short cargo at the stipulated rates per ton; the freighter having his remedy in damages for such short delivery. Ellenberough said, "The rule was well laid down by Lord Mansfield in Boon v. Eyre(b), that where mutual covenants go to the whole of the consideration on both sides, they are mutual conditions, the one precedent to the other; but where the covenants go only to a part, there a

<sup>(</sup>a) 10 East, 295.

<sup>(</sup>b) 1 H. Bl. 273.

remedy lies on the covenant, to recover damages for the breach of it; but it is not a condition precedent." Blanc, J., said, "The rule was laid down in Boon v. Eyre, and approved by this Court, in Campbell v. Jones (a), and by the court of Common Pleas in the Duke of St. Albans v. Shore (b), that where a covenant goes to the whole of the consideration on both sides, there it is a condition precedent: but where it does not go to the whole, but only to a part, there each party must resort to his separate remedy for the breach of the contract by the other. Here it is clear that the delivery of a complete cargo does not go to the whole consideration of the freight; because the failure of bringing home one ton less than the full quantity of 400 tons, would prevent the plaintiff from recovering for the 399 tons which he might have brought over. The loss on his part by such a construction would bear no sort of proportion to the injury suffered by the defendant. The fair construction, therefore, is, that the plaintiff should recover freight for what he has performed; and that the defendant should have a remedy against him for that which he has not performed, and which he ought to have done." So here, the agreement to allow Joseph Hall to have the milking of the entire number of thirty cows, does not go to the whole consideration, which is the rent; and if it did, the failure of furnishing one cow less than the whole thirty, would prevent the plaintiff from recovering for the 29 which he might have furnished. The fair construction of the contract seems to me to be, that Joseph Hall is liable to pay for such of the 30 cows as he has had, upon the same principle as the freighter in Ritchie v. Atkinson, was held liable to pay for so many tons of the cargo as were brought home; and, therefore, I am of opinion, that an action would be maintainable against Joseph Hall, upon the original agreement. It has been said that the rule applicable to surrenders in law, applies also to this case; and Com. Dig. Surrender, (I. 1),

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has been cited; but in the same author, Surrender (I. 2), it is expressly said, that if a lessee surrenders part of the estate, or accepts a new lease of part, it will be a surrender only for that part. I confess, I do not see much resemblance between the two cases, but, admitting them to be analogous, the new agreement in this case relating to two cows only, left the original agreement relating to 28 cows perfectly untouched. Then if the plaintiff could have maintained an action against Joseph Hall upon the original agreement, the question is, what effect the new agreement has had upon the defendant as the surety. The general rule is, that where the original contract is substantially altered, without the consent of the surety, he is discharged; and there are many cases where it has been held, that if the principal gives time to his debtor, he discharges the surety; and for this reason, that by giving time he deprives the surety of the chance of recovering against the other party. So, if the holder of a bill of exchange gives time to the acceptor, the indorser is discharged. So, in Eyre v. Bartrop (a), where time was given to the grantee of an annuity, it was said, that if any arrangement is made between the debtor and the creditor, altering the situation of the surety, the surety is released. So, in Davey v. Prendergrass (b) it was held, that it was no defence at law to an action on a bond against a surety, that by a parol agreement time had been given to the principal. The latter case went from this Court into the Court of Equity, the surety having filed a bill to restrain the action upon the bond, and to have it delivered up, upon the ground that time had been given to the principal, without the surety's consent: but as it did not appear that the situation of the surety had been rendered worse in consequence, it was held, that he was not discharged (c). There are cases in which the surety has been held to be discharged, on the ground of fraud, and with the principle of those cases I agree; but the fraud must be distinctly proved: and here,

<sup>(</sup>a) 3 Madd. 221. (b) 5 B. & A. 187. (c) 6 Madd. 124.

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it seems clear to me that no fraud whatever was intended. I think, that in order to discharge a surety by a variation in the contract, it must be a material variation, and such as substantially alters the relative situation of the parties. this case, in does not appear to me, that the situation of the surety has been materially altered. Suppose one man agreed to supply another with cloth for a year, at the rate of twenty bales per week, and there is a surety to the agreement; and the principals afterwards agree that, during some weeks in the year, only ten bales shall be supplied, and during others, 30: so that at the end of the year the same quantity will be supplied: would such a variation in the agreement make any alteration in the situation or liability of the surety? I think, clearly not. Or, suppose landlord agrees to let, and tenant agrees to take, 100 acres of land, with a surety for the payment of rent, and the tenant not finding it convenient to take the whole 100 acres, takes in fact only 50; would the surety be discharged? Certainly not, for the change is for his benefit. I think the real question in all these cases is, whether the original contract has been substantially performed; and that where it has, the surety has no right to complain, either in law or equity. Or, suppose, in this case, the plaintiff had declared upon the original agreement to let 30 cows for a year, and had proved an agreement to let 28 during one part of the year, and 32 during another; so that, upon an average, the defendant would have 30 cows during the whole year; would that have been a variance? I think clearly not: the two agreements are substantially and in effect the same. Thus, in Barbe, q. t. v. Parker (a), in an action for the penalty of the statute, 12 Aun., c. 16, the declaration stated a specific sum of money to have been lent, (in which the usury consisted); but the evidence was, that the loan was part in money and the rest in goods of a known value, which the party receiving the loan agreed to take as cash: and

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this was held good evidence to support the declaration. In Hands v. Burton (a), proof that the defendant agreed to sell his horse, warranted sound, to the plaintiff, for 311. 10s., and, at the same time agreed that if the plaintiff would take the horse at that value, he, the defendant, would buy another horse of the plaintiff's brother for 141. 14s., and that the difference only should be paid to the defendant, was held sufficient to support a count charging only, that in consideration that the plaintiff would buy of the defendant a horse for 31L 10s., the defendant promised that it was sound, and that in fact the plaintiff did buy the horse for that price, and did pay to the defendant the 31l. 10s. These cases shew that a slight variation will not of itself vitiate a contract, but that where the contract declared upon, and the contract performed, are substantially, though not literally, the same, there is no variance. Here, the variation was slight, and the substituted contract was substantially the same as the original contract; it seems to me, therefore, that performance of the substituted, was substantially performance of the original contract, and consequently, that the surety is not released from his liability. Had the original agreement been put an end to entirely, I admit that the surety would have been discharged; but the new agreement related only to the two cows: the original agreement continued as to the 28. Upon the whole, therefore, I am of opinion that the plaintiff is entitled to recover pro rata for the 28 cows, and consequently, that there ought not to be either a nonsuit or a new trial in this case; but as my two learned brothers are of a different opinion, the rule for entering a nonsuit must of course be made absolute.

Judgment of nonsuit.

(a) 9 East, 349.

DOE, on the demise of ANN LLOYD, v. C. POWELL, J. DAVIES, and J. THOMAS, assignees of THOMAS LLOYD, a bankrupt.

THIS was an action of ejectment, to recover the possession of a farm, messuages, and lands, situate in the parish of Winstanlow, in the county of Salop, and formerly in the theleaseshould occupation of the bankrupt, Thomas Lloyd. At the trial, before Garrow B., at the Salop summer assizes, 1825, the case was this. By deed of 20th November, 1795, the deed assigned lessee of the plaintiff, Ann Lloyd, covenanted with the bankrupt, Thomas Lloyd, that she would, when there- personal, to unto requested by him, demise, lease, set, and to farm benefit of his let to him, the premises described in the declaration, for creditors; and 41 years, at the annual rent of 2001. Proviso, that if declared a the rent thereby reserved, or any part thereof, should be unpaid for 21 days next after either of the days ap- the deed of aspointed for payment thereof, or if T. L., his executors, or administrators, should grant, assign over, pass away, or ruptcy, and depart, the messuages, mill, lands, tenements, and pre- that it did not mises, thereby agreed to be demised, or any part thereof, operate as a for all or any part of the said term, to any person or per- ance of the sons whomsoever, without the consent of the said A. L. lessee's interthereto first had and obtained in writing, that then and in lease. And, either of the said cases, it should and might be lawful to therefore, that it did not and for the said A. L. into the said premises to re-enter, work a forfeiand from thenceforth that deed, and every thing therein contained should cease, determine, and become void, any thing therein contained to the contrary notwithstanding. In pursuance of this deed, T. L. entered upon the premises, and continued in the possession of them until his bankruptcy, in April, 1825, having paid the rent up to Michaelmas, 1824. In January, 1825, being in embarrassed circumstances, he executed an assignment of all his property, real and personal, to trustees, who acted

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Proviso in a lease, for reentry, and that be void, if the lessee assigned withoutlicense. The lessee by all his property, real and trustees, for the was afterwards bankrupt: --Held, first, that signment was an act of bankvoid. Second. valid conveyest under the

Doz v. Powell. under the assignment, until April, 1825, when a docket was struck against T. L.; and on the 16th of that month, a commission of bankrupt issued against him, under which he was duly declared a bankrupt, and a messenger took possession of the premises, sold the effects, and has remained in possession ever since. For the lessor of the plaintiff it was contended, that the execution of the deed of assignment, in January, 1825, was a forfeiture of For the defendant it was contended, that the deed of assignment was an act of bankruptcy, and was therefore null and void; and consequently, that T. L. never had voluntarily assigned over his interest in the pre-The learned Judge inclining to the latter opinion, directed a nonsuit, but gave the lessor of the plaintiff leave to move to enter a verdict. In Michaelmas term last, a rule nisi was obtained for that purpose.

Campbell and Russell, shewed cause. The deed of assignment to trustees for the benefit of creditors was wholly null and void. It conveyed no interest whatever to the trustees; and did not operate as a conveyance of the tenant's interest in the premises. The execution of that deed of assignment was an act of bankruptcy. Now the property of a bankrupt vests in his assignees, by virtue of the assignment to them, from the moment when he committed an act of bankruptcy; therefore, from the moment when Lloyd executed the deed of assignment to trustees, all his interest in the premises passed from him, and vested in the defendants: and vested in them, not as assignees under the deed, but as assignees under the commission, by operation of law, and by force of the bankrupt acts. it is clear that an assignment by operation of law, will not work a forfeiture of a lease; Doe v. Carter (a), Doe v. Bevan(b); therefore, it follows, that there has been no forfeiture of the lease in this case. The law leans against forfeitures; and the Court will, if possible, hold the property to have passed by those means which do not include

a forfeiture: now that is possible here, for if the defendants take as assignees under the commission, no forfeiture is worked; but the deed of assignment cannot be allowed to operate without working a forfeiture.

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W. E. Taunton, and G. R. Cross, contra. First, even if the deed of assignment was void as a conveyance of the property to the trustees, still it was valid as against Lloyd. and its legal operation was to divest him of his interest in the premises, and to constitute his assignees under the commission tenants of the lessor, against her will. was precisely the operation which the lessor intended by means of the proviso to prevent; consequently, the deed of assignment was a breach of the proviso, and a forfeiture of the lease. Second, as against Lloyd himself, the deed was a valid conveyance of his property to the trustees. It clearly operated as such at the period of its execution in January, and it as clearly continued to operate as such down to April, when the commission was sued out. The proviso is extremely large; it not merely gives a power of re-entry for any breach committed, but declares, that "from henceforth" the lease, shall not become voidable, but "shall cease, determine, and become void." The assignment, therefore, being a breach of the proviso, the lease from that moment was void; it was a: nullity; it ceased to exist: and a forfeiture was not only worked before the commission issued, but would have been equally worked, if the commission had never issued at all. If this be not so, is was dependent upon the future contingency of a commission issuing or not, whether the lease would be void or not; but it would surely be preposterous to contend, that a lease once forfeited by a breach of a condition, can be afterwards revived as a valid lease by the happening of a contingency: or that a commission of bankrupt can have the effect of giving a renewed existence to that which has before absolutely ended and ceased to exist. A commission of bankrupt may avoid that which would otherwise be valid; but it cannot DOE v. Powell.

give validity to that which has once been made absolutely void. It is not every deed conveying away the property of a party, that is an act of bankruptcy; the bankrupt laws extend only to fraudulent conveyances. A fraudulent conveyance is that by which a man conveys away all his property; and it is upon that principle, that the law holds it fraudulent as against creditors, and constitutes it an act of bankruptcy: but if the argument on the other side is correct, the deed of assignment is absolutely void: it passes no interest; it conveys no property; and, as a necessary consequence, it is no act of bankruptcy, and the defendants have no title to the premises, and no defence to this action.

This case was argued at the sittings previously to *Hilary* term, before *Holroyd* and *Littledale*, Js., when the Court took time for consideration. Several other points were then discussed, but as the opinion of the Court proceeded exclusively upon that stated above, it was thought superfluous to refer to the others in the report of the case. Judgment was now delivered by

HOLROYD, J.—This was an action of ejectment brought for a forfeiture alleged to have been committed by the lessor of the plaintiff's son, who had entered upon and paid rent for the premises, and so become tenant from year to year to his mother, under an agreement between them for a lease to him for a long term of years. That lease was never executed, but was to have been granted subject to a proviso for re-entry, and to a condition, among others, that the lease should be void upon the lessee's assigning or demising the whole or any part of the premises without the license of the lessor in writing. The tenant, holding under that agreement, made an assignment of his property by deed, including his estate and interest in the premises in question, to trustees for the benefit of his creditors. That assignment was both void in law, and avoided in fact, as an act of bankruptcy, by a commission of bankrupt issuing, under which the tenant was declared a bankrupt,

and by an assignment to the assignees under the commis-The commission, declaration of bankruptcy, and assignment, were all prior to any act or proceeding done or instituted by or on the behalf of the lessor of the plaintiff, either for re-entry, or otherwise, to avoid the term or tenancy. Under these circumstances the bankrupt's assignment to the trustees, not only became void, and a nullity, ab initio, but was actually avoided by the bankruptcy and the proceedings founded thereon, before any advantage was attempted to be taken of the alleged forfeiture. deed, therefore, not operating in law as an assignment, was not, in consideration of law, an assignment by the bankrupt: but was, in that respect, the same as if it had never, in fact, been executed. The answer attempted to be given to this, by the counsel for the lessor of the plaintiff, namely, that it would then depend on the subsequent contingency of the issuing of a commission, or not, whether the bankrupt's deed would operate as a forfeiture, or not, and that it would be valid in the interim, is, in our opinion, no sufficient answer to this objection to the forfeiture; because the bankrupt's deed was void in law, and avoided in fact, ab initio; and, therefore, the title of the assignees of the bankrupt's estate and effects commenced by relation from the moment when that deed was executed. by no means an uncommon result. There are many cases in bankruptcy depending on the same contingencies, where the act done is valid in the interim, but is avoided by the subsequent commission and proceedings. Here, in consequence of the contingency, that is, the proceedings under the bankruptcy, happening, the assignment, that is, the event upon which the forfeiture was to arise, has in effect never been made; and that event must be fully and clearly established, in order to incur and enforce a forfeiture, which is a matter stricti juris. Upon this ground, therefore, we are of opinion that the nonsuit was right, and that the rule for setting it aside must be discharged.

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Rule discharged.

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W here a servant received on behalf of his master, in payment of goods sold, country bank notes at one o'clock on a Friday afternoon, and paid them to his master after on Saturday évening, and between three and four in the afternoon of Saturday the bank stopped payment:— Held, that the master was not guilty of laches in not presenting the notes before the bank stopped on the Saturday.

### JAMES v. HOLDITCH.

ASSUMPSIT for goods sold and delivered. At the trial before Burrough, J., at the last general issue. Devonshire assizes, it appeared in evidence, that the plaintiff, a farmer living at Tavistock, sent his hind on Friday, the 30th September, to sell some steers at Devonport, and he accordingly sold them there to the defendant, who paid him seven 51. promissory notes, payable to bearer at the bankinghouse of Messrs. Shields and Johns, at Devonport. distance between Devonport and Tavistock is fourteen miles. banking hours The hind received the notes from the defendant about one o'clock on the Friday afternoon, and on settling his accounts, paid them to his master on Saturday evening, his master being from home the whole of Friday. hind lived in the plaintiff's house. On the Monday fol. lowing, the notes were presented at the banking-house, when it was discovered, that the bankers had stopped payment on the previous Saturday, between three and four o'clock in the afternoon, and the question was, whether the plaintiff had not made the notes his own by not presenting the notes, or causing them to be presented, at the banking-house on the Saturday morning, at the farthest, when they would have been paid. On the part of the defendant it was submitted, that the plaintiff was guilty of laches, and therefore could not maintain the action. The learned Judge however overruled the objection, and the plaintiff had a verdict.

> Selwyn now moved to set aside the verdict, and enter a nonsuit, and contended in support of the motion, that the notes having been paid to the hind, that was in effect payment to the master, and consequently they ought to have been presented for payment on the Saturday morning, in which event they would have been paid.

PER CURIAM.—We are of opinion that there was no laches in this case to fix the plaintiff with the loss of the notes. If the hind could be identified with the master, probably the argument might be well founded; but nothing of that kind was established at the trial. The plaintiff was not at home on the day the hind received the notes, and although he was at home on the Saturday, it does not appear to us, that the hind was bound to state to him what description of money he had received. There was therefore no neglect on the part of the plaintiff in not presenting the notes on the Saturday, and consequently the learned Judge properly directed the jury to find for the plaintiff.

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Rule refused.

#### WILSON v. BODKIN.

ONE of the bail for the defendant in this case being opposed by counsel in the bail-court, prevaricated and contradicted himself as to the state of his circumstances, whereupon *Holroyd*, J., the presiding Judge, committed him to Newgate for his contempt, and ordered him to be brought before the Court to be further dealt with.

The offender was now brought into Court, and having nothing to offer in extenuation of his contempt,

ABBOTT, C. J. said, that if the Court thought there was any reason to suppose that the prevarication of this person arose from confusion or misapprehension, the Court would be disposed to deal with him leniently; but there being nothing to rebut the presumption that he was guilty of a wilful attempt to impose on the Court, and to withhold the truth as to the circumstances respecting which he

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Bail committed to Newgate for prevarication as to the state of his circumstances and property, on coming up to justify.

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was questioned, he must be considered as a very serious offender, whose conduct required exemplary punishment, in order, if possible, to deter other persons who offered themselves as bail, from misrepresenting their circumstances and situation, and concealing the real truth as to their sufficiency in point of property to justify. Court, therefore, for his offence, ordered that this party be committed to his Majesty's goal of Newgate for one calendar month.

Committed accordingly.

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A plaintiff being nonsuited, was taken in execution by the defendant for the costs, and whilst in execution brought another action for the same Court refused to stay further proceedings in the second, until the costs of the first action were paid.

# Beaven, gent. v. Robins.

THIS was a rule calling on the plaintiffs to shew cause, why the further proceedings in this action should not be staid, until the costs of a former action for the same identical cause, in which the plaintiff had been nonsuited, were paid.

Carter now shewed cause, on an affidavit, that the plaincause, and the tiff had been taken, and now remained in execution, at the suit of the defendant, for the costs of the former action; and therefore he contended, that the rule of practice requiring security for costs of a former action, before a second for the same cause was allowed to proceed did not apply to the present case.

> Archbold, in support of the rule, contended that the circumstance of the plaintiff being in execution for the costs of the former action, made no difference if the second was brought vexatiously. It is laid down by Mr. Tidd (a), that it was not formerly usual to stay the proceedings in a second action until the costs were paid of a prior one for

(a) Tidd, 8th ed. 584.

the same cause, and particularly if the merits did not come in question on the former trial; but of late years it has been done in several instances on the ground of vexation, and that, whether the former action was in the same or a different Court. In the King's Bench, this practice was not formerly confined to cases where a trial was had in the former action, but applied equally where the cause was put an end to by a judgment of nonpros, or as in case of a ponsuit.

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Abbott, C. J.—I think the objection to this rule is unanswerable. Here the plaintiff is actually in execution for the costs of the former action, you can have no more than his body.

BAYLEY, J.—The plaintiff may happen to have no other means of paying the costs of the former action, unless he recovers in this suit.

The other Judges concurred.

Rule discharged.

# PHILLIPS v. PEARCE.

THIS was an action of assumpsit for the use and occupation of a house situate in the parish of Wandsworth, in the dens only, county of Surrey. Plea, non assumpsit. At the trial cute leases, as before Alexander, C. B., at the last assizes for the county rate, of parish of Surrey, it appeared in evidence that the parishioners of lands, under

Thursday, April, 13th.

Churchwarcannot exe-59 Geo. 3, c. 12, s. 17.

Where the occupier of a house paid rent to churchwardens, and the latter afterwards demised the house by lease for a term to A., with notice to the tenant that he must consider A. as his landlord:—Held, in an action for use and occupation, that the tenant might impeach the lease, and shew that the lessee had no title derived from the churchwardens.

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Wandsworth had been in possession for a long series of years, of the land on which the house in question was No proof was given of the manner in which they became originally possessed of the land. other houses of the same description on the same land, and the rents of all had been received from time to time by the churchwardens, and applied in aid of the church rates. About six years since, six of the old tenements were pulled down, and rebuilt by the churchwardens out of the church rates. A Mrs. Sadler occupied one of the houses, at the rent of 25 guineas per annum, and she had paid rent to the churchwardens; and in 1824 she married the defendant, and both continued to occupy the premises until the period in question. In consequence of some difficulty found in collecting the rates due upon the houses, the parishioners, in vestry assembled, resolved that all the houses should be let at the highest rent which could be obtained, and public notice was given that they would receive tenders for letting them. The plaintiff Phillips sent in a tender, which was accepted, and in consequence, a lease was prepared, and afterwards executed on the 27th December, 1824, by Johnson and Skinner, the churchwardens, habendum from the Michaelmas preceding, for the term of 21 years. It appeared that the vicar of the parish refused to execute the lease. On the 9th January, 1825, Johnson, one of the churchwardens, went in company with the plaintiff to the defendant, and told him, that from the Michaelmas preceding, the plaintiff was to be considered as his landlord. At this time a year's rent was due to the churchwardens, which the defendant paid in the following The plaintiff demanded the quarter's rent to him due from the Michaelmas, 1824, up to the then Christmas following. The defendant made no objection to the payment of the rent, but merely stated, that he was not bound to pay rent quarterly, and promised, that when the ensuing Lady-day arrived, he would pay for half a year. He refused to pay the quarter's rent due from

Michaelmas to Christmas, 1824\_in advance. In consequence of this a distress was put into the premises for the quarter's rent, and the broker demanded 6l. 11s. 3d. defendant then stated, that if he was allowed time for a week or two, he would pay the rent. At the end of a fortnight, application was again made for the rent, but he refused to pay it. Before the distress was put in, a written notice had been delivered to the defendant, informing him that the plaintiff had become his landlord from Michaelmas, 1824. At Lady-day, 1825, a distress was put in for half ayear's rent. The defendant replevied, and the replevin being tried at these same assizes, a verdict was found for the defendant. In order to shew the churchwarden's title to demise the premises, an old lease was put in, by which it appeared, that they had demised the ground on which this and the other houses were erected, to a Mr. Sandford, for a term of 50 years, which had expired in It appeared that the vicar was not a party to this Various documents were also produced from the parish chest, to which it appeared the vicar had been a party, in the conveyance of parish property. It was contended, on the part of the defendant, that the churchwardens, not being a corporation either to take, or devise lands, &c., they had no authority to grant a lease under which the plaintiff could derive title. To this it was answered, that even assuming the churchwardens had no right to demise the parish lands, yet as the defendant had recognised their title by attorning to them, he was not at liberty to dispute the plaintiff's title derived from his former landlords. The Lord Chief Baron was of opinion, that the lease under which the plaintiff derived title was void for the objection taken, and accordingly directed a nonsuit, but with liberty to the plaintiff to move to enter a verdict for two quarters' rent.

Thesiger now moved accordingly. The nonsuit in this case proceeded on the ground that the churchwardens,

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not being a corporation, had no power to make a lease to the plaintiff(a). Assuming that the churchwardens had no authority to demise the premises in question, yet as defendant has recognised their interest in this house, as landlords, he cannot afterwards dispute the title of the plaintiff derived from them. The case of Rennie v. Robinson (b), is in principle applicable to the present case. There the premises were devised to an executor in trust for a Miss Darcourt, who afterwards married a gentleman named Williams, who let part of the premises under a written agreement signed by himself only, to the defendant, as a yearly tenant, and afterwards granted a lease for years of the whole of the premises to the plaintiff, which the wife refused to execute, although she was named therein, and the defendant had notice of the lease, and was required to pay any rent that might accrue subsequently to the plaintiff. In an action for use and occupation, it was held that the defendant was liable to the plaintiff, and could not impeach his title, as he must be taken to stand in the same situation as Williams, whose title, as landlord, the defendant had acknowledged, by occupying and enjoying the premises under him. [Bayley, J. Was not Williams to be considered as the mere agent of the trustee in that case? Abbott. C. J. You admit that by law the churchwardens, not being a corporation, cannot grant leases. Can they then be considered as a corporation by acknowledgment? Can acknowledgment make them a corporation if they cannot be so by law?] By paying rent to the churchwardens and attorning tenant, it is submitted that he cannot afterwards question the title of the plaintiff, which is claimed through the defendant's former landlords. Beside, here, when the rent due for the quarter ending at Christmas, 1824, was demanded, the defendant did not dispute the plaintiff's title to it, but said he would pay the half year which would be due at the Lady-day following. [Bayley, J.

<sup>(</sup>a) Co. Litt. 8 a.

<sup>(</sup>b) 7 J. B. Moore, 539; 1 Bing, 147.

But that is because he was told at the time, that the plaintiff had a good title; but upon discovering that he had no title, he promptly repudiated his liability, by replevying the distress afterwards made for the rent claimed to be due at Lady-day].

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ABBOTT, C. J.—The inconveniences experienced with respect to lands which had been long considered as belonging to parishioners, but which they could not sell or dispose of, by reason that they were not by law a corporation, had been felt by the legislature, and, therefore, by the statute 59 Geo. 3, c. 12, s. 17, a remedy was provided for those inconveniences in certain cases. That statute enacts, "that all buildings, lands, and hereditaments, which shall be purchased, hired, or taken on lease by the churchwardens and overseers of any parish, by the authority and for any of the purposes of this act, shall be conveyed, &c., to the churchwardens and overseers of the poor of every such parish respectively, and their successors, in trust for the parish, and such churchwardens and overseers of the poor, and their successors, shall and may, and they are hereby empowered to accept, take, and hold, in the nature of a body corporate, for and on behalf of the parish, all such buildings, lands, and hereditaments, and all other buildings, lands, and hereditaments, belonging to the Now, certainly, that act does not extend to this case, because, here the demise is not made by the churchwardens and overseers. I regret that such an objection should prevail, but such is the law.

BAYLEY, J.—I am also of opinion, that the church-wardens alone, have no title to the house, and, therefore, could convey to the plaintiff no interest. It has been decided in *Woodcock* v. Gibson (a), that the 59 Geo. 3, c. 12, s. 17, will not vest parish property in overseers only. We

(a) 6 D. & R. 524. 4 B. & C. 462.

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must, therefore, decide, as the converse of that case, that it will not vest in *churchwardens* only.

The other Judges concurred.

Rule refused.

Friday, 14th April. FOSTER v. H. BLAKELOCK, executor of L. BLAKE-LOCK, gent., one, &c.

In an action by sheriff's officer for his fees and for work and labour in executing divers writs :-Held, first, that the prohibition in the stat. 23 H. 6, c. 9, against a sheriff's officer taking more than certain fees upon an arrest, is confined to the fees to be taken of the party arrested, and does not extend to restrain the officer from suing for a reasonable compensation for work and labour at the

INDEBITATUS ASSUMPSIT for fees due and payable from the testator to the plaintiff, as a sheriff's officer; counts for work and labour in making divers captions, and executing divers writs for the testator at his request; and the common counts, on promises, first, by the testator, in his life-time, and second, by the defendant, as executor, since the death of his testator. Pleas: 1, Non assumpsit; 2, The Statute of Limitations; and 3, Plene administra-At the trial before Cross, Serjt., at the last Yorkshire assizes, it appeared in evidence, that the plaintiff was a sheriff's officer, and that the testator had been an attorney of this Court. The plaintiff had been employed on various occasions by the testator, to execute writs in causes in which the latter had been retained as an attorney for different clients. Accounts were delivered from time to time in the course of this employment to the testator. Shortly before his death, a particular of the demand in this action was delivered to him, but he did not object to

hands of the party by whom he is employed. Second, that a sheriff's officer expressly employed by an attorney to execute process, may maintain an action against the latter for such fees, &cc. as are usually allowed on the taxation of costs by the course and practice of the Court, and is not bound to resort to the clients of the attorney; and, Third, that the officer may sue for the sheriff's poundage upon levies, where he is accountable over to the sheriff.

Upon a plea of plene administravit, a probate stamp is presumptive evidence against an executor, that he has assets of the testator in hand to the amount which the stamp will cover, until the contrary is shewn.

any of the items, and merely said, "Let it wait awhile." The greatest portion of the business was done more than six years previous to the commencement of this action. Upon the delivery of a copy of the account to the defendant, after the testator's death, the defendant promised to pay it; and it was admitted that there was sufficient evidence to take the case out of the Statute of Limitations. In the account delivered, the plaintiff charged a fee of one guinea upon every arrest he had been employed to effect, and in several instances, a demand of one shilling per mile for travelling expenses was made. The account also contained two items, amounting to 71., for poundage upon levies under writs of fieri facias which he had executed. Evidence was given, that on the taxation of costs, the Master always allowed similar fees and charges to the sheriff's officer on arrests, which were charged in this instance. To prove assets in the defendant's hands, the plaintiff relied solely upon the probate of the testator's will, upon which was impressed a stamp sufficient to cover effects to the amount of one thousand pounds. The reasonableness of the plaintiff's demand was not disputed; but it was objected on the part of the defendant, first, that neither a sheriff's officer, nor the sheriff himself, could maintain an action for his fees; second, that supposing the action maintainable, it could only be brought by the sheriff himself; third, that, if maintainable, it ought to be brought, not against the attorney, but against the clients; fourth, that at all events, the sheriff's officer could not maintain an action for the sheriff's poundage; and fifth, that there was no evidence that the defendant, as executor, had sufficient assets in hand. The learned serjeant over-ruled these objections, and the plaintiff had a

verdict for 571. 15s. 3d., the whole amount sought to be recovered.

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Wightman now moved for a rule nisi for a new trial, on the ground of misdirection. First, a sheriff's officer can-VOL. VIII.

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<sup>(</sup>a) 1 Chit. 295; 2 B. & A. 562.

<sup>(</sup>b) 2 M. & S. 297.

<sup>(</sup>c) Latch. 15.

<sup>(</sup>d) 2 T. R. 158.

But there are instances without number, where his fees have been allowed without objection, on the taxation of costs, both as between party and party, and as between attorney and client; perhaps ten thousand in the course of the year]. Secondly, at all events, the action should not have been brought against the attorney, but against the clients whose names are mentioned in the particulars of the plaintiff's demand; Hartop v. Juckes (a). plaintiff was aware of the names of the parties employing the attorney, and he might easily have found them out upon inquiry, and so have sought his remedy against them. [Bayley, J. That may be; but who employs him? The clients know nothing of the officer employed by the attorney to execute process]. Thirdly, it is clear that the sheriff's officer has no right to recover for the poundage. That belongs to the sheriff, and if recoverable, the action must be brought in the name of the sheriff. The case of Bilke v. Havelock (b), is a strong authority to shew the jealousy with which courts regard actions brought by sheriffs for executing the king's writs. There it was held that the sheriff cannot maintain an action for the expense incurred in seizing and keeping possession of goods under a fieri facias at the request of the party suing out the writ, although they are not sold, on account of his refusing to give an indemnity against the claims of third persons. [Bayley, J. Here the law has fixed the sheriff's remuneration; there it has given nothing; but your argument goes to this, that the sheriff must execute every writ at his own expense]. The question however is, whether the officer can sue for the sheriff's poundage. [Bayley, J. No doubt the sheriff has a right to receive the money; but if the officer accounts to him for it, what difference does it make?] By the 23 Hen. 6, c. 9, the sheriff is not entitled to more than twenty-pence, and his bailiff to more than four-pence for an arrest. In such FOSTER

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case the officer would not be entitled to sue for the sheriff's

<sup>(</sup>a) 2 M. & S. 438.

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fee. [Abbott, C. J. No doubt if the sheriff is entitled to the fee, he might sue for it. According to the language of the statute, the sheriff shall not take more than 1s. 8d. or the bailiff more than 4d. for the arrest; but these fees are taken of the party arrested, not of the plaintiff in the suit]. This is properly a claim against the plaintiff in the suit. In Dew v. Parsons. and Bilke v. Havilock, the actions were against the plaintiffs in the suit, and yet in both the sheriff was held not entitled to recover. [Bayley, J. The case last mentioned is very different from this. There the sheriff sought to make a charge for keeping possession of the goods; but the action was held not to lie, because that might be the means of great extortion, and that was certainly a very strong instance, inasmuch as the sheriff brought an action to recover 300l. for keeping possession of the goods]. Certainly, the objection here is not to the reasonableness of the plaintiff's charges, but as to his right of suing the attorney. His remedy, if any, was either against the sheriff himself, by whom he was appointed, or the clients of the defendant's testator, for whom the business was done. [Bayley, J. The difference between this case and Hartop v. Juckes, where it was held that the solicitor under a commission of bankruptcy, is not liable in the first instance to the messenger whom he nominates for his bill of fees, is, that in general the solicitor does not employ the messenger, but he is paid out of the assets when the commissioners have allowed his claim. Here there is no privity between the officer and the attorney's client]. Then, lastly, the probate being stamped to a certain amount, was not conclusive evidence of the defendant having assets in his hands belonging to the testator, sufficient to pay this demand. [Bayley, J I think it was, until the contrary was shewn. The probate has the stamp which the defendant, as executor, desires to be put upon it, and he makes oath that the effects do not exceed the amount upon which the stamp duty would be payable. That implies that there are effects to that

amount at least, and, in the absence of proof to the contrary, it would be conclusive upon the executor].

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ABBOTT, C. J.—Upon the whole, I think we ought not to grant a rule to shew cause in this case. I agree in what has been said, that the sheriff can maintain no action for any fee beyond that which the statute allows him. case I am of opinion that the bailiff could maintain an action against a party arrested to recover his fee of 4d. Not more. The prohibition in the statute 23 Hen. 6, against the sheriff taking more than 1s. 8d., and the bailiff more than 4d., is confined to the taking of fees from the party arrested, or those acting for him. That leaves open this question, namely, whether if a sheriff's officer is specially employed by an attorney to make an arrest, it may not reasonably be presumed that the party who employs him undertakes and gives him to understand that he will for his pains and labour, pay him that sum which the courts of law are in the habit of allowing by their officers on the taxation of costs, there being no statutable provision upon the subject; and I take it, that as the bailiff acts under the presumption, if not upon the faith, that he will receive such sum for his labour, as is usual in practice to pay him, he would be entitled to maintain an Thus far I mean to express myself as to the right of the bailiff to recover what is usually paid. Next as to the person of whom he is entitled to claim his remu-I am of opinion that he is entitled to claim it neration. of the attorney who employs him. The bailiff knows nothing of the plaintiff to the suit. The writ is delivered to him by the attorney, and upon executing it, he has a right to look to the party by whom he is immediately employed, without regard to the person who may happen to be the plaintiff. The practice so universally acted upon throughout the kingdom, shews in the first place, that the officer is entitled to receive a reasonable compensation for his trouble, and in the second, that he has a right to

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receive that compensation at the hands of the attorney. On the other points, there is no occasion for me to pronounce an opinion.

BAYLEY, J.—If the attorney leaves it to the sheriff to employ his own officer, the manner in which that officer is to be paid, is foreign from the present question. the sheriff employs his own officer, the burthen of executing the writ is cast upon the officer in the particular instance; but where the burden is cast upon the officer by the selection of the attorney, and not in the ordinary course of the officer's duty, is it not reasonable that he should have such a compensation as is allowed according to the invariable usage and practice in such cases? Then who is the person from whom the officer is to receive payment for making the arrest? He is to receive it of the person by whom he is employed, namely, the attorney. When an attorney employs his own officer, the presumption is, that he employs him on the terms on which sheriff's officers are usually paid under the sanction of the Court. The stat. 23 Hen. 6, as my Lord Chief Justice has suggested, does not apply to the payment of fees by the party who employs the officer, but the person against whom the officer is employed; and was passed not with a view to limit the fees to be taken from the person who employs the officer, but the fees to be taken from the person against whom the officer is to execute process, and to prevent the officer from exacting inordinate fees from the party arrested. is said, that the plaintiff in the action, and not the attorney, is the person who ought to be sued for the officer's fees. I am of a different opinion. The person who employs the officer, is the attorney. It is true, he knows the names of the different plaintiffs at whose instance the suit is commenced; but where they live, or are to be found, he may know nothing whatever. There is no privity between him and them, and as they are the immediate clients of the attorney, and as it is the known usage and

habit of the attorney to employ the officer, I think the action may properly be brought against the attorney. Then as to the point made about the charge for poundage, I think no new trial ought to be granted on that ground. In the common course of things, the sheriff receives his poundage by the hands of the officer, and when that is so, the presumption is, that whatever poundage is due to the sheriff, is accounted for to him by the officer. If nothing is shewn to the contrary, the presumption in this case is, that the officer has properly paid the sheriff. Under these circumstances, I am of opinion, that the plaintiff is entitled to retain the verdict.

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Holboyd, J.—I am of the same opinion. I think no distinction can be made respecting the poundage, as the plaintiff would be accountable to the sheriff for the money received on his behalf. I agree with my Lord Chief Justice in his observation upon the statute 23 Hen. 6, that the limitation of fees therein mentioned, is applicable to the defendant against whom process is executed, and not to the person by whom the officer is employed. It has been the course, in taxing costs at law, to allow to the plaintiff's attorney, money paid by him to the sheriff's officer, for executing process, and they have been admitted as legal payments by the attorney on his client's behalf. I think the plaintiff is entitled to maintain an action for a reasonable sum, as against the attorney, who actually employs him.

LITTLEDALE, J., was in the Bail Court.

Rule refused.

Friday, 14th April.

A cognovit is not within the rule 15 Car. 2, requiring an attorney to be present on the part of a de-fendant in custody, executing a warrant to acknowledge a judgment; and therefore where a defendant in custody signed a cognovit without the presence of his attorney, the Court refused to set aside the judgment and execution thereon, on a suggestion that the defendant was not aware at the time, of the nature of which he signed.

#### BAYLEY v. TAYLOR.

SCOTLAND moved for a rule to shew cause why the judgment signed, and the execution thereon in this cause, should not be set aside for irregularity, with costs. defendant was arrested in this action on the 6th July, 1825, for a debt of 301., and whilst in custody under the arrest, was taken by the sheriff's officer to the office of the. plaintiff's attorney, where he gave a cognovit, in presence of the plaintiff and his attorney, for 371., including the debt and costs, but no attorney was present on behalf of the defendant. Judgment was signed on the cognovit in Hilary term last, and a fieri facias issued, under which the defendant's goods were taken in execution. It was suggested, that the defendant was not at all aware of the nature of the cognovit at the time he signed it, but it was not alleged that any undue advantage had been taken of him. Under these circumstances it was contended, on the part of the defendant that the cognovit was void, it having been held, that such an instrument was within the rule of Court, 15 Car. 2, which requires, in cases of warrants of attorney executed by a defendant in custody, that an the instrument attorney on behalf of the latter should be present. · ley, J. Is a cognovit within the rule, according to the practice of this Court?] In Parkinson v. Caines (a), this Court relieved the defendant, although it was objected by the plaintiff's counsel in that case, that the rule did not apply to a cognovit, but to warrants of attorney only. referred to Webb v. Aspinall (b), and Paul v. Cleaver (c), by which the practice appears to be clearly established in the Common Pleas, where the rule is framed in the same terms as in this Court. He also contended, that the case of a cognovit taken from a person in custody, without the presence of a legal adviser, was within the mischief intended to be remedied by the rule of Court.

(a) 3 T. R. 616.

(b) 7 Taunt. 701.

(c) 2 Id. 360.

ABBOTT, C. J.—Whether a new rule of Court respecting cognovits may be expedient, is a matter worthy of consideration, but it appears to us that a cognovit does not come within the rule referred to. Undoubtedly, if any undue advantage had been taken of the defendant to induce him to sign the cognovit, we should be authorised on the authority of the cases cited, in affording the defendant relief; but as no complaint of that kind is made, we ought not to interfere. The defendant ought not to sign an instrument of this nature, without previously apprising himself of its contents, or sending for his attorney to advise with him as to the nature of the instrument.

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BAYLEY, J.—In the case of Parkinson v. Caines, the Court distinctly said, that a cognovit was not within the rule, 15 Car. 2, but that in such instances to which the rule did not apply, each case must depend on its own particular circumstances. In that case the Court allowed the judgment to stand for the sum actually due, instead of that for which the cognovit was taken. As there is here no suggestion that the cognovit was taken for a larger sum than was really due, I think we are bound to say, that this case does not come within any equitable construction of the rule of Court, still less within the very terms of it.

HOLROYD, J., concurred.

LITTEDALE, J., was in the Bail Court.

Rule refused (a).

(a) See Lee v. Thurston, and the notes thereto, 1 Chit. 267.

Friday, 14th April.

A person who has been in custody more than twelve months, under an attachment for non-payment of costs, not exceeding 201., is not entitled to his discharge under the 48 G. 3, c. 123.

## The King v. Edward Clifford.

READER moved for a rule to shew cause why this defendant, who had been in custody more than twelve months, under an attachment issuing out of this Court, for non-payment of costs, not exceeding 201., pursuant to an order of the Court, should not be discharged out of custody, by virtue of the provisions of the statute of 48 Geo. • 3, c. 123, contending that the defendant must be considered as "a person in execution upon a judgment," within the meaning of that statute. Sed,

PER CURIAM.—Rex v. Habbard (a), and Rex v. Dunne (b), are decisive authorities against the present application But, independently of authorities, the language of the preamble of the statute clearly shews, that a person in the situation of this defendant was not intended to come within its operation. It is an act for the relief of debtors in execution for small debts, and of persons in execution upon judgments, and it is impossible to consider this defendant as coming within either of those descriptions; he being in custody under the criminal jurisdiction of the Court, for a contempt of its order. The act expressly reserves to the creditor a remedy against the lands and goods of the debtor; but here, as there is no judgment against the defendant, if we were to discharge him, we could not reserve to his creditor that remedy which the act expressly gives him. If we were to discharge this defendant, his creditor's remedy would be gone altogether. It is clearly not a case within the act.

Rule refused.

(a) 10 East, 408.

(b) 2 M. & S. 201.

GRANT and others v. FLETCHER and another.

THIS was an action of assumpsit for not accepting 400 bags of Egyptian cotton, pursuant to contract. Plea, non assumpsit. At the trial before Hullock, B., at the last goods for his assizes for the county of Lancaster, it appeared in evi- made a verbal dence, that the plaintiffs having received advices from their correspondent in Alexandria, that he had shipped for after entering their account at that port, a cargo of Egyptian cotton, which was expected to arrive at Liverpool by a certain signing it, deperiod, they in the meantime employed a broker, named Withington, to effect a sale of part of the cargo on their sold note to The broker accordingly sold the 400 bags in vendee respecquestion to the defendants, at the price of 172d. per lb. Long before the ship arrived, Egyptian cotton had fallen in the market nearly one-half the price so agreed upon. At the there was no trial, the question was, whether there was a sufficient memorandum of the contract in writing, within the meaning the contract to of the 17th section of the Statute of Frauds, to bind the defendants. It appeared, that Withington at first entered into a parol contract with the defendants, and afterwards entered it in his memorandum book, as follows:- "Sold Peter Fletcher and Son, 400 Egyptians, to arrive per Robert, Wake, at 173d. per lb." The following note of the contract was afterwards delivered to the defendants:-"Robert, Wake, 400 bags Egyptian cotton, at 172d. Shipped on the 22nd February, for Wm. Grant and Brothers. Henry Withington." The following note was on the same day delivered to the plaintiffs: - "Fletcher and Son, at 172d., ten days and three months from the delivery, you allowing me my commission. On the part of the defendant it was objected, that there being a variance between the contract delivered to the defendants, and that to the plaintiffs, neither party was bound; and the case of Cumming v. Roebuck (a), was relied

Saturday, 15th April.

A broker employed to effect a sale of principal, contract with a vendee, and it into his own book without livered a bought and the vendor and tively, each paper differing in its terms :memorandum in writing of bind either party, under the Statute of

(a) Holt, N. P. C. 172.

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upon as an authority in point. The learned Judge yielded to the objection, and directed a nonsuit.

Cross, Serjt., now moved to set aside the nonsuit, and obtain a new trial. There is no doubt, that the requisites of the Statute of Frauds may be satisfied by a contract which is written on more papers than one. It will not be disputed, that taking together the three papers which were given in evidence, they afford abundant proof of a written contract between these parties. The only ground of objection, therefore, is, that in the paper delivered to the buyer, no mention is made that he was to have three months' credit for the cotton, that term being mentioned in the paper delivered to the seller. But that is not a material variance, because, coupling those two papers with the entry in the broker's book, an intelligible contract is completely It is not disputed, that if the two papers made out. which were delivered to the buyer and seller respectively, contained a totally different contract, neither party would be concluded. But these two papers are not inconsistent with each other, and as neither contains a complete contract, recourse must be had to the broker's book, and then these three several instruments will make out a complete contract, shewing the names of the vendors and vendees, the nature of the commodity sold, the price, and the terms on which the goods were delivered. The only question in these cases is, whether the transaction between the parties was in fact reduced to writing, so as to satisfy the Statute of Frauds; and it is submitted, that here there is such evidence of a written contract, as will entitle the plaintiff to recover.

ABBOTT, C. J.—I am of opinion, that there was no evidence of an entire contract to bind either of the parties. I think that the memorandum in the broker's book, must be left wholly out of the question. Properly speaking, the entry in the broker's book is the original contract;

but that not being signed by him, it is not binding. The question then is, whether either of the two papers constitutes an entire contract, and I think neither of them does. Here are two notes delivered, one to the buyer, and the other to the seller, and both materially differ from each other. Had they been similar, and both been signed by the broker, probably they would have been binding, although the memorandum of the contract in the broker's book had not been signed. It is the duty of the broker to enter the contract in his book, sign it, and then deliver a perfect copy, also signed, to each party. Here the notes delivered to the contracting parties are dissimilar, and as neither contains a perfect contract, I think the defect cannot be helped by the broker's book. I have had repeated occasion, since I have been on the bench, to observe the slovenly and imperfect manner in which brokers conduct their business, and that great injustice arises to parties from a want of ordinary attention to their duty.

1823.
GRANT
D.
FLITTHER.

BAYLEY, J.—The broker is the agent of both parties, and in that character he may bind them by signing the same contract on behalf of buyer and seller; but if a broker delivers two different notes, varying from each other, one to the seller, the other to the buyer, neither is bound; because he is thereby holding out to one party that he is selling on certain terms, and to the other, that the goods have been bought on different terms. Here neither of the notes contains a perfect contract, and they cannot be compared together in order to make out a contract between the parties, still less can the broker's memorandum be prayed in aid for that purpose.

The other Judges concurred.

Rule refused.

Tuesday. 18th April,

A guaranty in these terms, " I do hereby agree to become surety for R. G., now your traveller, in the sum of 5001., for all money he may receive on your account," is sufficient to sustain a declaration averring the consideration to be, that the plaintiffs would keep and continue the traveller in their service.

### RYDE and others v. Curtis.

ASSUMPSIT on a guaranty given by the defendant to the plaintiffs, for money which the plaintiffs' traveller might receive on their account. The declaration contained several counts averring that the plaintiffs had retained and employed one R. G. as their traveller, and that the defendant undertook, in consideration of their continuing R. G. in the plaintiffs' employment, to be answerable to the amount of 500l. Plea, non assumpsit. At the trial before Abbott, C. J., at the sittings in London after last term, the following letter, signed by the defendant, and addressed to the plaintiffs, was given in evidence :-- "4th August, 1823. I do hereby agree to become security for Mr. R. G., now your traveller, in the sum of 5001., for all money he may receive on your account." The other parts of the case being made out, the plaintiffs had a verdict for 500l.

Carter now moved to enter a nonsuit or obtain a new trial, on the ground that on the face of the guaranty there was no consideration stated sufficient to bind the defendant. The declaration averred the consideration to be, that the plaintiffs would continue to keep the traveller in their employment. Now the paper signed by the defendant, imports no such undertaking, and it cannot be presumed, in the absence of direct proof, that there was any subsequent communication between the parties. The words "now your traveller," do not necessarily imply that the plaintiffs were to keep the traveller and continue him in their service. There is, therefore, no consideration to satisfy the Statute of Frauds, and make the desendant liable as surety. He cited Bevill v. Turner (a).

ABBOTT, C. J.—I think it sufficiently appears on the face of this instrument, that the consideration for the guaranty was the continuance of the traveller in the service of the plaintiffs. I see no doubt about it.

1826. Ryde CURTIS.

The other Judges concurred.

Rule refused.

DOE d. WOOD and another v. TEES and others.

EJECTMENT for certain lands and premises situate at Stoke Fleming, in the county of Devon. Plea, the general issue. At the trial before Burrough, J., at the last Devonshire assizes, it appeared, that the lessor of the death, is a plaintiff claimed the premises in question as heir at law of witness in a person named Lord, and that the defendants claimed as devisees under the will of the same person. The question support the was, as to the sanity of the testator at the time of executing his will. The lessor of the plaintiff's pedigree was admitted; and in order to support the defendants' case, and establish the will, a person named Hockin, who appeared was executed. to be the executor appointed by the testator, and also to be a debtor to testator at the time of his death, was called as a witness. It was objected on the part of the plaintiff that Hockin, being executor and also a debtor, was incompetent on the ground of interest, and therefore was inadmissible to give evidence. The learned Judge, however, thought him a competent witness, and he was admitted accordingly.

Verdict for the defendants.

Wilde, Serjt., now moved for a new trial, on the ground that the evidence of the executor was inadmissible. executor being also a debtor, he had an interest in sup-

Tuesday, 18th April.

An executor. who is also a debtor to the testator at the time of his competent ejectment for the realty, to will, the issue being as to the sanity of the testator at the time his will

Doe v. Tees.

porting the will, inasmuch as the executorship released his debt at law. The statute 25 Geo. 2, c. 6, certainly does not apply to this case, because here Hockin is not an attesting witness. That statute has reference to legatees who happen to be the attesting witnesses to a will, and though it avoids the legacies, yet it makes the legatees competent witnesses to support the will. This, at least, shews that, but for the statute, they would be incompetent on the ground of interest. In this case, as the executorship releases the debt, the witness had a direct interest in shewing that the testator was of sound mind at the time of executing his will; and therefore, he was incompetent.

ABBOTT, C. J.—I think the executor was an admissible witness, inasmuch as his evidence would not go to discharge his liability as a debtor to the testator's estate. His evidence might support the will as respected the realty, but setting up the will would not discharge him of his liability to the personalty.

BAYLEY, J.—The executor's own debt would be assets in his hands for which he would be liable at law, according to a case in 1 Salk. 306. The verdict in this case would not be any evidence in the Ecclesiastical court upon the grant of probate. This verdict in favour of the will would leave the question as to the personal estate entirely open, to be disposed of by the Spiritual court. This suit would be treated as res inter alios acta in the Spiritual court, upon the validity of the will, as to the personal property.

The other Judges concurred.

Rule refused.

### CORNISH v. Pugh.

ASSUMPSIT for goods sold and delivered. Plea, the general issue. At the trial before Gaselee, J., at the last assizes for the county of Cornwall, the wife of one of the evidence for defendant's bail was tendered as a witness to prove a fact, on whose material to the defendant's case. It was objected, that as the bail himself could not be a witness, neither could came bound. the wife, and of this opinion was the learned Judge, and the plaintiff had a verdict.

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The wife of bail is incompetent to give the defendant, behalf her husband be-

Halcomb now moved for a new trial, and admitted. that the bail himself could not be called as a witness; but as it had never been decided that the wife of bail was inadmissible as'a witness for the defendant, it was thought necessary to take the opinion of the Court upon the point.

Per Curiam.—There cannot be a doubt, that if the bail himself cannot be a witness for a defendant, the wife is equally incompetent, her interest being identified with her husband.

Rule refused.

# The King v. Boltz.

THIS defendant had been tried before Abbott, C.-J., at the last Thetford assizes, and found guilty of publishing convicted of a a libel. He was then apprehended and committed under misdemeanor

Tuesday,

Where a defendant, at the assizes, was com-

mitted to the county gaol to abide the judgment of this court, and was detained for no other cause, the court, on a suggestion of his inability to pay the expense of bringing himself up, allowed a motion for a new trial to be made without his personal attendance.

The Court cannot compel a prosecutor to pay the expense of bringing a defendant in custedy up to receive judgment for a misdemeanor; but if the defendant is too poor to come up at his own expense, they will pass judgment upon him in his absence.

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the Lord Chief Justice's warrant to his Majesty's gaol at Norwich, to abide the judgment of this court.

F. Kelly (with whom was Gunning), was now instructed, in the absence of the defendant, to move for a new trial, suggesting on affidavit that the defendant was too poor to pay the expense of bringing himself from Norwich gaol, in order to be present during the motion for a new trial, in compliance with the practice of the Court. Under such circumstances he submitted that the Court would entertain the motion in the defendant's absence.

ABBOTT, C. J.—If the defendant is in custody under a warrant of a Judge of this court, as a consequence of the conviction in this case, and he is not detained in prison for any other cause, we think the motion for a new trial may be made without his personal presence.

The other Judges concurring,

Kelly proceeded to make his motion for a new trial, but

The COURT refused it, suggesting however that the matters disclosed might avail the defendant in mitigation of punishment when he should be brought up for judgment.

Kelly then stated, that the defendant in his affidavit expressed his belief that the prosecutor did not intend to bring him up for judgment, but meant to let him remain in prison. He therefore moved for a rule, calling on the prosecutor to shew cause why he should not, at his own expense, bring the defendant up to receive the judgment of the Court, and in default of his so doing, why the judgment should not be pronounced in defendant's absence.

Rule granted accordingly.

On a subsequent day, cause was shewn against the rule

by Storks, on the part of the prosecutor, and Kelly and Gunning were heard in support of it.

1826. The King 10. BOLTZ.

The COURT said they had no authority to compel the prosecutor to pay the expense of bringing the defendant up to receive judgment; but on the suggestion of the defendant's poverty and inability to bring himself up, they made the rule absolute for pronouncing judgment upon him in his absence, and accordingly sentence was passed upon him in his absence.

### HALL v. BURGESS.

ASSUMPSIT for the use and occupation of a set of chambers in Clifford's Inn. Plea, non assumpsit, and issue thereon. At the trial, before Abbott, C. J., at the adjourned Middleser sittings after last term, the case was quitted at the The defendant had held the chambers of the plaintiff as tenant from year to year. The rent was payable half yearly. At Michaelmas, 1824, being the end of the current year, the defendant, suddenly, and without any notice, quitted the chambers, and sent the key to the plaintiff's agent. The agent at first refused to take possession of the chambers, but afterwards, and before the end of the next half-year, without any communication either with the plaintiff or the defendant, let the chambers to another ed the first tetenant, who took possession of them. The action was brought to recover the rent from Michaelmas, 1824, up to the time when the chambers were let to the new tenant. The Lord Chief Justice directed the Jury to find a verdict for the defendant; and they found accordingly.

Denman, C. S., now moved for a rule nisi for a new The defendant having quitted the chambers without giving a notice to quit, remained liable for the rent subsequently accruing due, unless the plaintiff by any act of

Tuesday, 18th April.

Where a tenant from year to year, at a rent payable half yearly, end of a current year without giving notice; and the landlord re-let the premises, before the end of the next balf-year, to another tenant :--Held, that the landlord had evictnant, and could not maintain use and occupation against him for any rent subsequent to the period when he quitted.

HALL v. Burgess. his has released him from that liability. Now the plaintiff's letting the chambers before the end of the half-year, could not deprive him of his right to sue the defendant for rent for the period during which they were unoccupied; for in the first place, that was an act done in ease and for the benefit of the defendant; and in the second place, the defendant having before that time refused to occupy any longer, had no right to object to such a disposition of the chambers by the plaintiff.

BAYLEY, J.—When a landlord sues for rent, he must rely either upon an express contract made with the tenant, or upon an implied contract arising out of the relation existing between them. Here there was an express contract for rent payable half-yearly, and the rent was paid up to Michaelmas, 1824; therefore, no further rent would become due until Lady-day, 1825. The tenant abandoned the premises at Michaelmas, 1824, without giving any notice to quit; the landlord, therefore, was entitled to consider him as his tenant for another year. But the landlord let the premises to another tenant, thereby electing not to consider the defendant any longer as his tenant; the effect of which was, to release the defendant from all further liability, and to waive his own claim to rent for the interval between the defendant's quitting, and the chambers being let to another tenant.

HOLROYD, J.—Previous to the 11 Geo. 2, c. 19, a land-lord could sue for rent only upon the demise, and could recover only according to the terms of it. The tenant's abandonment of the premises, in this case, was no determination of the tenancy; but the landlord himself determined it, by re-letting the premises. That re-letting was, in point of law, an eviction of the tenant; and if the action had been founded on the demise, might have been pleaded in bar, and would have been an answer to it. The 11 Geo. 2, c. 19, which gave the action for use and occupation, was

intended to remove the difficulties attending the action on a demise; but it was not intended to give the new form of action in cases where the old one was not maintainable. I think the verdict for the defendant was right.

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LITTLEDALE, J.—The contract in this case, by which rent was payable half-yearly, for every half-years' occupation, was an entire contract, and could not be divided but by the consent of both parties. If the plaintiff had declared specially upon the contract, he must have averred that he permitted, or was ready and willing to permit, the defendant to occupy for the whole half-year from Michaelmas, 1824; which averment would have been falsified by proof of his having re-let the premises before that halfyear expired. I think that view of the case shews clearly that the verdict found for the defendant was right.

Rule refused.

### BROOKES v. HEBERD.

COVENANT by the assignee of a lease against the assignor. The declaration stated the defendant's covenant, that up to the date of the assignment, all the covenants of the lease had been performed, and also a covenant for quiet declaration, enjoyment, notwithstanding any acts or omissions of de-Breach assigned, in the words of the covenant fault, the for quiet enjoyment, that plaintiff could not, after the assignment, nor did, peaceably hold and enjoy the premises, notwithstanding acts and omissions of defendant; but on the contrary thereof, plaintiff saith, that the indenture of the case, notlease assigned to him, contained a general covenant to the informalirepair, within three months after notice, and a clause of ty. re-entry for non-repair; and that the defendant before and until the time of the assignment, had neglected to repair, and that before the assignment, the lessor had served

Thursday 20th April.

However informally a breach of convenant may be assigned in a yet, after judgment by de-Court will pronounce such judgment as will meet the justice of withstanding

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notice on the defendant to repair within three months, and that by reason of the neglect to repair, the lessor brought an ejectment, which plaintiff was obliged to compromise, and to expend money in repairing the premises, and to pay the costs of the ejectment; and that by reason thereof, plaintiff could not quietly hold and enjoy, &c. Plea as to so much of the declaration as related to the not repairing within three months after notice, that the three months notice did not expire until after the assignment. Demurrer and judgment for the defendant, the Court holding that the plea was properly pleaded to that part of the declaration, whereupon the plaintiff executed a writ of inquiry as to the residue of the declaration, not answered by the plea. On the execution of the inquiry, the undersheriff ruled, that the plea pleaded by the defendant, went to the whole declaration, and, therefore, that the plaintiff was entitled to nominal damages only; and accordingly the plaintiff had a verdict for one shilling,

Chitty, on a former day, obtained a rule nisi for a new writ of inquiry, on the ground of misdirection by the sheriff, contending, that assuming the breach of covenant to be inartificially assigned, still, if there was enough to shew on the face of the record, that the defendant had broken the covenant to repair, the plaintiff was entitled to damages for the injury which he had sustained.

R. Bayly had also obtained a cross rule for setting aside the writ of inquiry, and arresting the judgment altogether, on the ground, that the defendant's plea extended to the whole declaration; and being now called upon to support that rule, he argued that the declaration as framed, assigned only a breach of the covenant for quiet enjoyment, and did not properly assign any breach of the covenant to repair. Sed,

PER CURIAM.—The defendant's plea is specially

pleaded to the not repairing within three months after notice. It is therefore no answer to that part of the declaration, which alleges that the premises were out of repair at the time the assignment was executed. However clumsily and inartificially the breach is framed, yet, as it appears on the record, that there had been a breach of the covenant to repair, the plaintiff is entitled to damages to the amount of injury he has sustained by reason of the defendant's breach of the covenant. The rule for a new inquiry must therefore be made absolute, the costs of that motion to be costs in the cause; and the rule for arresting the judgment must be discharged with costs.

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Both rules were accordingly disposed of as directed by the Court·

# STONE v. MARSH and another.

THIS was an issue out of Chancery to try at law whether the defendants were indebted to the plaintiff. At the trial before Abbott, C. J., at the sittings in London after tried at law by the Lord Chancellor, Lord Chief Justice reserved some points of law, arising in the case, for further consideration.

Where, on an issue directed to be rected to be tried at law by the Lord Chancellor, points of law were reserved for consideration.

F. Pollock now moved for a rule misi for a new trial, in order to have the questions reserved by the learned Judge considered and decided by this Court. It is true, that this being an issue out of Chancery, a motion for a new trial in the ordinary course, must be made in that Court; but some points of law having been reserved by the Lord Chief Justice, the Lord Chancellor will expect that those points shall be disposed of in this Court, before the record

Thursday, 20th April.

Where, on an issue directed to be tried at law by the Lord Chancellor, points of law were reserved for consideration, the motion for a new trial, with a view to have the points discussed, must be made in Chancery, and not in this Court.

1826. STONE MARSH. is sent back to him. The motion for a new trial, therefore ought properly to be made in this Court.

PER CURIAM.—This being an issue out of Chancery, it appears to us, that the motion for a new trial ought to be made in that Court, and if the Lord Chancellor thinks proper to direct a special case to be framed for our opinion on the points of law reserved, we shall be prepared to entertain it, and give our judgment; but we think you are bound to mention the case to that Court in the first instance.

Pollock, accordingly, withdrew the application.

F. K. Perreau, executrix of S. Horton v. — Bevan, Esq.

Friday, 21st April.

In an action on the case against a sheriff for negligence in losing a replevin bond, given by a party for prosecuting his suit with effect in the county court; the declaration averred that the plaint had been removed out of "the

CASE against the late sheriff of Carmarthenshire for negligence in losing a replevin bond taken by him upon a distress for rent, due to the plaintiff, as executrix to Samuel Horton, deceased, whereby she was prevented from having an assignment thereof, and from suing thereon as she would be entitled to do. The third count of the declaration (upon which the questions hereafter mentioned arose) stated, that Frances Keeble Perreau, executrix of Samuel Horton, deceased, and David Evans, and Rees Jones, as her bailiffs, theretofore, to wit, on the 20th December, 1822, aforesaid, in the parish of, &c., in the county county court of the said sheriff," by re-fa-lo, &cc.; and it appearing that at the time of the removal, the sheriff who had taken the replevin bond, was out of office:—Held, no

the removal, the sherm who had taken the replevin bond, was out of omce:—rieid, no variance, and that the word "said" might be rejected as surplusage.

The condition of a replevin bond for prosecuting the plaint "with effect," means prosecuting it "with success;" and, therefore, if a plaintiff in replevin fails, the bond is broken, and the defendant is not restrained from suing on the bond, though he omits to sue out a writ de retorno habendo, and cause elongata to be returned thereon.

If the defendant in replevin elects to proceed on the stat., 17 C. 2, c. 7, he is not confined to his execution under that statute, but may sue the sureties on the replevin bond, or the sheriff in an action on the case, for negligence in losing the bond.

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of Carmarthen, in a certain close, called White Hall, took and detained certain cattle, goods, and chattels, (set forth and described), of one Evan Treharne, then being on the said last mentioned premises, of great value, to wit, of the value of 2001., for the sum of 971. 10s. then due and owing to plaintiff, as executrix, as aforesaid, for rent; that the said E. Treharne, afterwards, and within the space of five days then next ensuing, to wit, on the said 23d December, 1822, to wit, at, &c., made his plaint to defendant, then being sheriff of the said county of Carmarthen, out of the county-court of the said sheriff, of the taking and unjustly detaining of the said goods and chattels of the said Evan Treharne by the plaintiff, and the said D. Evans and R. Jones; and prayed, that the said cattle, goods and chattels, might be forthwith replevied by the said sheriff, and delivered to him, the said Evan; and thereupon the defendant, so being sheriff of the said county of Carmarthen aforesaid, according to the form of the statute in such case made and provided, did take from the said Evan, and two persons, to wit, J. Haines, and J. Treharne, as two responsible sureties, a bond, in double the value of the said cattle, goods and chattels, to wit, in the sum of 1841. 17s. 6d., bearing date the 23d December, conditioned for the appearance of the said Evan at the next county-court, after the date of the said writing obligatory; to be holden and kept for the county of Carmar then, and for his prosecuting there with effect his suit, which he had commenced against the said Frances Keeble Perreau, and the said D. Evans and R. Jones, for the taking and unjustly detaining the cattle, goods and chattels in the said condition mentioned, being the cattle, goods and chattels so distrained, as last aforesaid, and for making a return of the said last mentioned cattle, goods, and chattels, if a return thereof should be adjudged; and thereupon the defendant, so being sheriff, &c., at the prayer of the said Evan, replevied and made deliverance of the said cattle, goods, and chattels, to the said Evan, and he afterwards appeared

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at the next county-court, held for the said county of Carmarthen, and in the same court, without the writ of our lord the King, levied his plaint against the said Frances Keeble, David, and Rees, for the taking and unjustly detaining the said cattle, goods and chattels of the said Evan, and found pledges, as well for prosecuting the said complaint, as for returning the said cattle, goods and chattels, if return thereof should be adjudged by law; which said plaint afterwards, to wit, on the 25th day of March, 1823, was duly removed at the instance of the plaintiff, and the said David and Rees, out of the county-court of the BAID sheriff of the said county of Carmarthen, into the court of great sessions, for the said county of Carmarthen, by virtue of his Majesty's writ of recordari facias loquelam, returnable before the justices the first day of the next sessions; and thereupon the said Evan afterwards, to wit, at the next great sessions held for the said county, to wit, on the 7th April, 1823, at, &c., (the declaration in replevin, and the avowry and recognizance by the plaintiff and her bailiffs for rent and arrear, were then set out). The count then proceeded to state, that such proceedings were thereupon had in the said plea, in the court of great sessions, that afterwards, to wit, on the 14th August, in the year 1824, to wit, at, &c., before the aforesaid justices, it was considered in and by the said Court, that the said Evan, should take nothing by his said writ, but that he and his pledges to prosecute should be in mercy, and that the said Frances Keeble, David, and Rees, should go thereof without day, and that they should have a return of the said last-mentioned cattle, goods and chattels, as by the record and proceedings thereof remaining in the said court of our said lord the King, of great sessions, more fully appears. And whereas, it was the duty of the defendant, so being sheriff, as aforesaid, and having so taken the said writing obligatory, to have taken due and proper care thereof, so as to have been able to assign the same to the plaintiff, executrix, as aforesaid, in case the same should become forfeited, and she should be entitled to have the same assigned to her according to the form of the statute in such case made and provided, and should require the same to be assigned to her; and the plaintiff, executrix as aforesaid, in fact, says, that the said Evan did not make a return of the said cattle, goods and chattels, or any part of them, or any part thereof, according to the form and effect of the said condition of the said writing obligatory, but wholly neglected and omitted so to do, and therein failed and made default, whereby the writing obligatory became and was forfeited, and the plaintiff, as executrix, as aforesaid, was entitled, and was minded, and was desirous to have the same assigned to her; but she in fact says, that the defendant not regarding his duty in that behalf, took so little care of the said writing obligatory, that the same by, and through his negligence and default, was, after the giving thereof to the defendant, as such sheriff, to wit, on, &c., at, &c., lost, and by means thereof, the plaintiff, executrix, as aforesaid, was hindered and prevented from having, or obtaining an assignment thereof, and by means thereof, she has been, and still is, hindered and prevented from bringing an action, or actions, on the said last-mentioned writing obligatory, and has been, and is, deprived of the means of recovering the said arrears of rent, and the costs of the said action, and has been otherwise greatly injured and damnified, to wit, at Carmarthen aforesaid. Plea, the general issue not guilty. At the trial before Burrough, J., at the Herefordshire summer assizes, 1825, the case appeared to be this: -On the 23d of December, 1822, the defendant, being then sheriff of Carmarthenshire, took from Evan Treharne the replevin bond, for the loss of which, this action was brought. On the 25th March, 1823, the plaint in replevin was removed by re-fa-lo, from the county-court into the court of great sessions, at which time the defendant ceased to be sheriff. From the record of the proceedings in the court of great sessions it

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appeared, that the jury, after affirming the tenancy of Treharne, found the rent in arrear, due from him, to be 971. 10s., and then assessed the damages under the stat. 17 Car. 2, c. 7, besides costs, to the same amount, being the value of the distress. The record then stated a judgment (at common law) of the Court to be, that the plaintiff in replevin should take nothing by his writ, but that he and his pledges to prosecute, should be in mercy, and that the defendants in replevin should go without day, and that they should have a return of the goods and chattels to hold them irreplevisable for ever. It then gave judgment upon the stat. 17 Car. 2, c. 7, that the defendants in the replevin should recover against the plaintiff in the replevin 971. 10s., the arrears of rent, and 1391. 17s. for costs, and that the defendants should have execution thereof. It appeared also from the record, that the Court, upon the prayer of the defendants in replevin, granted a writ of fieri facias to the sheriff of Carmarthen, to levy the sum of 2371. 7s., the amount of rent and costs. Evidence was then given, that a writ of fieri facias had issued, and that the defendant had returned thereon, nulla bona; but there was no proof that any writ de retorno habendo had been issued. It further appeared, that upon application being made to the defendant's agent to assign the replevin bond, he admitted that it could not be found, and was in fact lost. part of the defendant three objections were taken; first, a variance between the declaration and the evidence, for in the former it was averred that the plaint was removed out of the county-court of the said sheriff of the county of Carmarthen, and the defendant being the only person described therein, as the sheriff, that allegation imported that the plaint was removed out of the county-court of the defendant, whereas, according to the evidence, the defendant had, at that time, ceased to be sheriff; second. that the action could not be supported inasmuch as the plaintiff had sustained no injury by the loss of the re-

plevin bond, because the bond could not have been enforced upon the judgment until a writ de retorno habendo had been issued, and a return of elongata made thereon; and third, that the defendant in the replevin having elected to proceed under the stat. 17 Car. 2, c. 7, she was confined to her execution under that statute, and was estopped from proceeding afterwards, either against the sheriff or against the sureties upon the replevin bond. The learned Judge overruled all these objections, holding, first, as to the variance, that the word "said" might be rejected as surplusage, the substance of the allegation being, that the replevin had been removed out of the county-court; second, that as Trehame, the plaintiff in · the replevin, had not prosecuted his suit with effect, i. e. successfully, the present plaintiff became damnified by the loss of the replevin bond, and that it was not necessary for her to have sued out a writ de retorno habendo to enable her to maintain this action; and third, that the plaintiff was not estopped by proceeding under the statute. 17 Car. 2, c. 7, but still had her remedy upon the replevin bond, or against the sheriff for his negligence in losing it, whereby she lost her remedy upon the bond. The Jury accordingly, under his Lorship's directions, found their verdict for the plaintiff, damages 1841. 17s. 6d., but with leave to the defendant to move to enter a nonsuit.

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Russell accordingly obtained a rule nisi for that purpose, in Michaelmas term last. At the sittings under the king's warrant before last Hilary term, [Holroyd, J., and Littledale, J., only, being present] cause was shewn against the rule, by

W. E. Taunton. First; as to the supposed variance, the question is, whether the averment in the declaration, that the plaint in the replevin was removed "out of the county-court of the said sheriff of the said county of Carmarthen," refers to some individual sheriff, or only the sheriff

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of the county of Carmarthen, whoever that sheriff might Now it is quite obvious, that this allegation has reference to the office of sheriff, and not the individual sheriff. The substance of the averment is, that the plaint was removed out of the county-court; and as it is perfectly immaterial who the individual sheriff was at the time it was removed, the word "said," may be rejected as surplusage. All that was material to be proved here, was correctly averred, namely, that the plaint was removed out of the county-court. The case of Bushy v. Watson (a), is a strong authority on this point; but the recent case of Draper v. Garratt (b), is decisive. That was an action against the sheriff for taking insufficient pledges in a replevin, and the declaration professing to set out the record . in the replevin suit, averred under a videlicit, that the plaint in the county-court was levied before A. B., C., and D., as suitors; and although it appeared from the record itself, that it was levied before E., F., G., and H., the Court held the variance immaterial (c). Then as to the second objection, the gist of this action is the negligence of which the defendant has been guilty in executing his office, and, therefore, whether the plaintiff had or had not sued out a writ de retorno habendo, and caused a return of elongata to be made thereon, is wholly immaterial. Such an objection does not lie in the mouth of the sheriff as an answer to his negligence in losing the bond. would more properly apply to an action against the sureties on the replevin bond, because then it must be shewn that there has been a breach of the bond; but as applied to this case, the objection is unintelligible. In this case it is sufficient for the plaintiff to shew, that she has sustained an injury by the loss of the replevin bond; and this is manifested by shewing that the conditions of the replevin bond

<sup>(</sup>a) 2 Sir W. Bl. 1050.

<sup>235.</sup> Phillips v. Shaw, 4 B. & A. 435. Judge v. Morgan, 13 East,

<sup>(</sup>b) Ante, vol. iii., 226. 2 B & C. 2.

<sup>557.</sup> Pippet v. Hearne, Ante,

<sup>(</sup>c) See King v. Pippet, 1 T. R. vol i. 266.

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have been broken. These conditions are threefold; first, for the appearance of the plaintiff in replevin; second, to make return of the goods and chattels distrained; and third, that he prosecutes his suit with effect. breach of any one of these conditions is a sufficient cause Here it appeared that the plaintiff in replevin of action. did not prosecute his suit with effect, and therefore his bond was broken. If, therefore, by reason of the loss of the bond, the present plaintiff was prevented from suing the sureties, she sustains a damage, and must seek her remedy against the sheriff. It is no excuse for the sheriff to say, that no writ de retorno habendo has been sued out. Here the bond was forfeited by the plaintiff in replevin not prosecuting his suit with effect. Prosecuting with effect, means prosecuting with success; Morgan v. Griffith (a), Duke of Ormand v. Bierly (b), and Turnor v. Turner (c). It is clear that the conditions of the replevin bond are independent, and any one being broken, that will give a cause of action on the bond; Dias v. Freeman (d), Gwillim v. Holbrook (e). Judgment being given against the plaintiff in replevin, he did not prosecute with effect, and, therefore, the bond being forfeited, the defendant in replevin would have had a cause of action, of which she has been deprived by the negligence of the defendant in losing the bond. This is decisive to shew that the defendant is liable to the plaintiff for the injury she has thus sustained. Thirdly, if the plaintiff would have a right of action on the bond, if it had been assigned to her, and by reason of the loss of the bond, the sheriff would be liable to her for negligence, the question is, whether, having elected to proceed under the statute 17 Car. 2, c. 7, she is estopped from proceeding in this action. It is clear, that the object of that statute was to give a more effectual remedy for recovering rent in

<sup>(</sup>a) 7 Mod. 380.

<sup>93 &</sup>amp; 94.

<sup>(</sup>b) Carth. 519.

<sup>(</sup>d) 5 T. R. 195.

<sup>(</sup>c) 4 J. B. Moore, 606. 2 B. &

<sup>(</sup>e) 1 B. & P. 410.

B. 107. See Adams on Ejectment,

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arrear, in addition to the old common law judgment in replevin. There is no exception in that statute as to common law judgments, and it is not limited to the cases where the judgment shall be at common law. The plaintiff, therefore, was not ousted of her common law remedy, and she might have sued on the replevin bond, notwithstanding the proceeding under the statute. The case of Turnor v. Turner (a), is an express authority on this point. There it was held, that if judgment be given against the plaintiff in replevin for not prosecuting his suit with effect, his sureties on the bond will be answerable to the avowant, notwithstanding he has afterwards proceeded on the 17 Car. 2, c. 7, s. 2, and obtained a judgment under a writ of inquiry in pursuance of that statute, to recover the arrearages of rent and costs. It is true, that in Cooper v. Sherbrooke (b), Bathurst, J., is reported to have said, that "the legislature intended by the statute 17 Car. 2, that the proceeding on that statute by writ of enquiry, fieri facias and elegit, should be final for the avowant, to recover his damages. and that the plaintiff was to keep his cattle, notwithstanding the course of a writ de retorno habendo;" and in Tidd's Practice (c), it is also said, that "if the defendant proceed upon the statute 17 Car. 2, c. 7, for the arrearages of rent and costs, he cannot have a writ of retorno habendo; nor consequently proceed against the pledges on account of the plaintiff's not making a return of the cattle or goods, nor as it seems against the sheriff for taking insufficient pledges;" but these dicta were brought under the notice of the Court, and fully considered in Turnor v. Turner, and adjudged not to be law. In a MS. case of Dunn v. Dunbar, in King's Bench, Hil. 1820, the doctrine laid down in the Common Pleas, in Turnor v. Turner, was adopted and acted upon. Another authority cited in support of this third objection, was Combe v. Cole, Hil. 10 Geo. 2, referred to in Com. Dig. Pleader, 3 K. 31. What-

<sup>(</sup>a) 4 J. B. Moore, 606. 2 B.

<sup>(</sup>b) 2 Wils. 117.

<sup>&</sup>amp; B. 107.

<sup>(</sup>c) Tidd, 1079. Ed. 8th.

ever may have been the circumstances of that case, it was decided before the statute 11 Geo. 2, c. 19, s. 22, and certainly forms no part of the original Digest of Lord C.B. Comyns. The present case cannot be distinguished from Turnor v. Turner, and Dunn v. Dunbar, and, consequently, as the plaintiff is not concluded by electing to proceed on the statute 17 Car. 2, she has her remedy against the defendant for his negligence in losing the replevin bond, upon which she would have had a right of action against the sureties, had it been assigned to her.

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Campbell, R. V. Richards, and John Evans, on the same side, were stopped by the Court.

Russell, Archbold, and Chilton, in support of the rule. The objection on the ground of variance has not been answered on the other side, nor do the authorities cited remove the difficulty. It is submitted that the averment in the declaration, that the plaint was removed out of the county-court of the said sheriff, applies to the defendant in his individual and personal character. the beginning to the end of the declaration, the defendant is charged with laches as sheriff of the county of Carmarthen. The third count begins by stating, that the said Evan made his plaint to the defendant, then being sheriff of the said county of Carmarthen, out of the county-court of the said sheriff, and prayed that the cattle, &c., might be forthwith replevied by the said sheriff; and thereupon the defendant so being sheriff of the said county, did take a bond, &c., so that throughout, the defendant is spoken of in his personal capacity, and he is identified with his office of sheriff, and it alleges that he, in his individual character, held the court out of which the plaint was removed. This is matter of description, and therefore ought to have been strictly proved, which distinguishes this from the cases of Bushy v. Watson, and Draper v. Garratt. The plaintiff professes to

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describe the court out of which the plaint was removed, and avers that it was removed out of the defendant's court, whereas, in fact, he was not sheriff at the time of the re-In the Dean and Chapter of Rochester v. Pierce (a), which was an action for use and occupation, it was held, that if the name of the present dean is mentioned at the beginning of the declaration, and it is afterwards said that the occupation was "by the permission of the said dean," and it appears in evidence that the defendant occupied only in the time and by the permission of a former dean, the variance is fatal. Here the plaintiff having undertaken to allege that the plaint was removed out of the defendant's court, she was bound to prove it; Bevan v. Jones (b), Bromfield v. Jones (c). Second, this action is not maintainable, inasmuch as the breach of the replevin bond, as alleged in the declaration, was not proved at the trial. It is not denied that a breach of any one of the conditions of a replevin bond would be sufficient, because the conditions are independent; but if the plaintiff selects, and relies upon a particular breach, she is bound to prove it. Now, the breach assigned in this declaration is, that Evan Treharne, the plaintiff in the replevin, did not make a return of the cattle distrained. The declaration avers that it was the duty of the defendant, as sheriff, to take care of the replevin bond, in order that it might be assigned to the plaintiff; and then assigns as the breach of the bond, that Treharne did not make a return of the cattle, &c., whereby the bond became forfeited. This breach was not proved, inasmuch as it was not shewn that the plaintiff, in order to have a return of the cattle, &c., had sued out a writ de retorno habendo. The goods could not be returned until the writ de retorno had been sued out; and, therefore, the breach assigned is not sustained. It is said, on the other side, that as the plaintiff in replevin did not prosecute his suit with effect,

<sup>(</sup>c) Ante, vol. vi., 500. 4 B. & (a) 1 Camp. 466. C. 380. (b) Ante, vol. vi., 483. 4 B.

<sup>&</sup>amp; C. 403.

that allegation in the declaration is sufficient. But it is submitted, that the meaning of that condition in the replevin bond, is not that the party shall prosecute it with success, but that he shall prosecute it to final judgment; and if so, then there is no breach of that condition, because Trehame did prosecute the replevin to final judg-The authorities cited on the other side do not militate against this proposition, and there is no case that has decided that prosecuting a replevin with effect, means prosecuting with success. This being an action against the sheriff for negligence in not having the replevin bond to assign it, in consequence of a breach of some of the conditions by the plaintiff in replevin, before such an action can be maintained, it must be shewn that the plaintiff has been damnified. Now it does not appear that she has been damnified, because it is not proved that she has sued out a writ de retorno habendo, with elongata returned thereon by the sheriff. In proceedings against bail to an action, there is no doubt that a capias ad satisfaciendum must first be sued out and returned non est inventus, before steps can be taken against the bail on the bond. So here, the plaintiff was bound to sue out a writ de retorno habendo, before she could have any remedy on the replevin bond. Suing out the writ de retorno was a condition precedent; and therefore, she has no remedy against the defendant for an injury which she does not prove she has sustained. As, therefore, the breach assigned was not proved, this action is not maintainable. Thirdly, the plaintiff is barred of her action against the sheriff, by having elected to proceed under the statute 17 Car. 2, e. 7. She had one of two remedies, either to proceed at common law for a return of the cattle, or under the statute for the arrearages of rent and costs, but she cannot have both. There is great good sense in what is laid down in Tidd's Practice (a), where it is said, "If the defendant proceed upon the statute 17 Car. 2, c. 7, for the arrear-

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ages of rent and costs, he cannot have a writ de retorno habendo; nor, consequently, proceed against the pledges, on account of the plaintiff's not making a return of the cattle or goods, nor, as it seems, against the sheriff for taking insufficient pledges." Here the plaintiff has elected to proceed under the statute, and therefore she is concluded.

HOLROYD, J.—Upon the question of variance our minds are made up. On the other points, Turnor v. Turner does not appear to be distinguishable from the present case, but we shall take time to consider of those points, before we give judgment. The objection on the ground of variance, is clearly not sustainable, especially on the authority of the late case of Draper v. Garratt. The averment that the plaint was removed out of the county-court of the said sheriff is not an allegation of description, but of substance only; and it appears to me, that it was sufficiently proved. The declaration states, that the plaintiff in replevin made his plaint to the defendant, then being sheriff of the said county of Carmarthen, out of the county-court of the said sheriff, of the taking and unjustly detaining of the said goods and chattels of the said Evan by the plaintiff. and the said David and Rees, and prayed that the said cattle, goods and chattels, might be forthwith replevied by the said sheriff, and delivered to him, the said Evan. The substance of this allegation is only, that there had been a plaint levied in the county-court of Carmarthen. by Evan Treharne, without professing to specify what particular sheriff presided in the county-court. It then goes on to state, that the plaint was afterwards duly removed on such a day, at the instance of the plaintiff and the said David and Rees, out of the county-court of the said sheriff. The word "said" there, does not necessarily mean the defendant, as an individual sheriff, distinguishing him from the sheriff of any other county. If, indeed, this could be considered as a description of the sheriff of a different county, it might be treated as a variance; but as

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it seems to me that the substance of the allegation is, that the plaint was removed out of the county-court, and as that fact was established in evidence, the variance is immaterial; and, at all events, the word "said" may be rejected as surplusage. The late case of Draper v. Garratt, is decisive upon this point; and our present determination also derives confirmation from the decision in Bushy v. Watson, where a declaration for maliciously indicting at the general quarter sessions, instead of the general sessions, was held to be sufficient. On the authority of these two cases, I think the variance here is not fatal. The allegation, that the plaint was levied in the county-court. was proved, and the subsequent allegation, that it was removed out of the county-court of the said sheriff, must be taken to mean the office, and not the individual; and assuming the word "said" to make any difference, I think it may be rejected.

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LITTLEDALE, J.—I am of the same opinion. The facts proved here are not inconsistent with the allegation in the declaration, because the substance of the allegation is referable to the office, and not to the individual sheriff; and it is wholly immaterial who the individual sheriff was who presided in the county-court at the time the plaint was removed. But, at all events, I think the word "said" may be rejected as surplusage; and then the averment will have been most satisfactorily proved.

Cur adv. vult.

HOLROYD, J., this day delivered judgment on the other points. This was a motion for a new trial, and came on to be argued before my brother *Littledale* and myself, on *Thursday*, the 19th *January* last, at the sittings before *Hilary* term, and the following is our joint judgment upon the case. It was an action against the late sheriff of *Carmarthen*, tried before *Burrough*, J., at the last summer assizes for *Herefordshire*. A verdict was found for

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the plaintiff, damages, 1841. 17s. 6d. The action was for negligence in the execution of his office of sheriff, and the questions made at the trial, and upon which a rule was granted to shew cause why the verdict should not be set aside, and a nonsuit entered, or a new trial granted, arose upon the third count. That count was for negligence in the defendant, as sheriff, in losing a replevin bond taken by him upon a distress for rent due to the plaintiff, as executrix, by which she was prevented from having an assignment thereof, and suing thereon as she would have been entitled to do. One of these questions was a question of variance, which the Court (my brother Littledale and myself) disposed of, and over-ruled upon the argument, when cause was shewn against the rule for a nonsuit or new trial, and therefore I shall take no further The other question was, whether upon that third count, as framed, and the proof in support thereof, that was given at the trial, the action was maintainable. [After stating that count the learned Judge proceeded]. When the record of these proceedings in replevin was produced and proved at the trial, it appeared by it, that upon the jury giving their verdict in favour of the present plaintiff, and her bailiffs, the three defendants in that suit, the jury, at the prayer of those defendants, according to the stat. 17 Car. 2, having proceeded to inquire concerning the arrears of rent, and the value of the distress, found the arrears to be 971. 10s., and that the true value of the distress was also 971. 10s.; and therefore, not only the common law judgment was given against the plaintiff in replevin, of nil capiat per breve, and his pledges to prosecute being in mercy, and the defendants in replevin thereof going without day, and the judgment pro retorno habendo, but also judgment according to the above statute of Car. 2, for the said arrears of rent 971. 10s., and 1391. 17s. costs, in the whole 2371. 7s.; and that the defendants in replevin have execution thereof. The record also contained the entry of a prayer by the defendants in replevin, of a

fieri facias to the sheriff of Carmarthenshire, to levy the above arrears of rent and costs, and that it was granted to them, returnable before the justices of the said court of great sessions, on the first day of the then next great sessions, to be holden in and for the said county. Besides this award of execution, it was also proved at the trial, that a fieri facias issued, which was returned by the sheriff nulla bona, and there was no proof that any writ de retorno habendo had been issued upon the judgment. And it was objected at the trial, first, that the action, therefore was not maintainable, on the ground, that the replevin bond could not have been enforced upon the judgment, as set forth in the third count above stated, previous to the issuing of a writ de retorno habendo, and a return of elongata thereon; and, consequently, that the plaintiff had sustained no injury on which to maintain an action against the sheriff for the loss of the replevin bond; and, secondly, that the avowant having elected to proceed under the stat. 17 Car. 2, c. 7, could neither proceed against the sheriff, nor upon the replevin bond, but was confined to his execution under the statute.

With regard to the first of these two grounds of objection, the want of a writ de retorno habendo, and a return of elongata thereon, it appears to us, that a writ de retorno habendo and a return of elongata thereon, were not necessary to enable the plaintiff to put the replevin bond in suit against the obligors, in case the same had not been lost, but had been assigned to her; and that the judgment as stated in the third count with, and even without, the averment in that count, that the plaintiff in replevin did not make a return of the cattle, &c., pursuant to the condition of the bond, and without any averment of a writ de retorno babendo, and a return of elongata thereon, shewed sufficiently a breach of the condition of the bond on which the plaintiff in this suit might maintain an action against the sureties, in case the replevin bond had been assigned to her; and, consequently, an action against the

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PERREAU v. Bevan. sheriff for his negligence in the loss of the bond. This is fully established by the several cases that have been decided upon the subject. If the bond in question had been simply conditioned for a return of the distress, if a return should be adjudged, without more, there might have been something in the objection, but this is a case in which the bond was taken pursuant to the stat. 11 Geo. 2, c. 19, s. 23, as all others ought now to be, and conditioned not merely for making such return, if it should be adjudged, but also for prosecuting the suit with effect; and the condition of the bond is broken, and the bond forfeited, as well by not prosecuting the suit with effect, as by a default of making a return of the distress on such return being adjudged, each part of the condition being independent of the other, and the bond forfeited by a failure in either. The failure of prosecuting the suit with success is, we think, a failure of prosecuting the same with effect, and this was so even before the stat. 11 Geo. 2, c. 19. In Chapman v. Butcher (a), in an action on a similar bond, the defendant pleaded that he had prosecuted a suit with effect in the court below, but that a writ of error was brought in the King's Bench, where the judgment was reversed; to which the plaintiff replied, that the judgment in the King's Bench also was, that the plaint in the court below should abate, and that there should be a return irrepleviable. On demurrer to this replication, on which other objections were made, [namely, the unlawfulness of the bond, because it was alleged, that pledges ought to have been taken, and not a bond, and that the condition did not extend to any judgment of retorno habendo, in any Court, but only in the court below where the plaint was levied, and the judgment of that court was then reversed], judgment was given for the plaintiff in the suit on the replevin bond, although it would seem, that the replication contained no allegation, that no such return was made; [consequently, there was no

breach of the condition shewn, but the not prosecuting with effect], nor was there any allegation that any writ de retorno habendo issued, or that there was any return of elongata thereon, which, if necessary, ought to have been alleged; but there was only an allegation that the suit was not prosecuted with effect in the Court above, that is, with final success, and that a return irrepleviable was And in a later case, since the stat. 11 there adjudged. Geo. 2, Gwillim v. Holbrook (a), where, in like manner, nothing more appeared on the pleadings beyond the judgment de retorno habendo, on demurrer, judgment was given for the plaintiff. It is true, that no objection appears to have been made on that account, in either of those cases. So in the Duke of Ormond v. Brierley (b), in a similar action, where it appeared on the pleadings, that the plaintiff in replevin died before the suit was determined by which the suit abated, but where he had by injunction from the Exchequer, hindered the proceedings till his death, so that it was alleged "he did not prosecute his suit with effect." upon demurrer the defendant had judgment, for per Holt. C.J., "This was a prosecution with effect, because there was neither a nonsuit or verdict against E. C. (the plaintiff in replevin), and so it is on a recognizance on a writ of error, which is also to prosecute with effect, if the plaintiff is not nonsuit, nor the judgment affirmed, the recognizance is not forfeited." This shews that Lord Holt's opinion was not merely that a nonsuit or nonpros for not following up the suit to judgment; but that a judgment, against the plaintiff in replevin, without his default of following up the suit to judgment, that is, that his not prosecuting the suit with final success and judgment accordingly, whether with or without judgment de retorno habendo, is a breach of the condition. So in Waterman v. Yea (c), which was since the stat. 11 Geo. 2, c. 19, it appears the replevin bond was sued upon without any previous writ de retorno habendo, but no objection was made to the

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<sup>(</sup>e) 1 B. & P. 410.

<sup>(</sup>b) Carth. 519.

<sup>(</sup>c) 2 Wils. 41.

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action thereon upon that account. But prior to that case (but whether prior or subsequently to the stat. 11 Geo. 2, does not appear), it seems in Morgan v. Griffiths (a), Lee, C. J., said, that in all replevin bonds, there are several independent conditions; one to prosecute, another to return the goods replevied, and a third to indemnify the sheriff; and a breach may be assigned upon any distinct parts of And it is material that this should be the case, for, though a return of the distress may have been actually made, as well as adjudged, yet the avowant may and will still be damnified, by reason of his costs of suit, where the distress so returned is not of sufficient value to pay him his costs, as well as his arrears of rent. And in Dias v. Freeman (b), in an action by the assignee of the sheriff on a replevin bond, on a declaration stating, that plaintiff, as bailiff of J. W., distrained, &c., on J. Lacey, in the usual form, where the breach was, that L. did not appear at the county-court next after giving the bond, according to the condition; and did not then and there, or in any manner, or at any place or time, prosecute his suit with effect against the plaintiff; and on a special demurrer thereto, the declaration was adjudged good, and the plaintiff had judgment thereon, although non constat that the suit in replevin was legally determined, or what the judgment was, if any, that was given therein, or whether there was any judgment or writ de retorno habendo, and return thereof or not. But the late case of Turnor v. Turner (c), is decisive that the not prosecuting the suit with effect, is a breach of the condition, and that an action is maintainable on the replevin bond, although it appeared that the judgment was pro retorno habendo; and, although it did not appear that any writ de retorno habendo had issued or been returned, and although there was no allegation that a return had not been made. That case, too, is also decisive on the other point, and has established, and, we think, rightly established, that the avow-

<sup>(</sup>a) 7 Mod. 380 (n).

<sup>(</sup>c) 4 J. B. Moore, 606. 3 B. & B.

<sup>(</sup>b) 5 T. R. 195.

<sup>107.</sup> 

ant, by having elected to proceed under the stat. 17 Car. 2, c. 7, is not confined to his execution under the statute, but might proceed upon the replevin bond, if it had been assigned, and may proceed against the sheriff for his negligence in the loss of it, notwithstanding what is stated to have been said by Bathurst, J., in Cooper v. Sherbrooke (a), that "by stat. 17 Car. 2, the legislature intended that the proceeding upon that statute by writ of inquiry, fieri facias and elegit, should be final for the avowant to recover his damages, and that the plaintiff should keep his cattle, notwithstanding the course of awarding a writ de retorno habendo, which is a right judgment, for the statute has not altered the judgment at common law, but only gives a further remedy to the avowant." The Common Pleas. however, had that case urged to them as in point to that effect; but, after taking time to consider, upon deliberation and reasons stated at length in the report, decided contrary to that doctrine of Bathurst, J.; and it may be observed, that on adverting to the preamble, as well as to the provisions of that statute, the legislature meant only to facilitate the landlord's remedy against his tenant, and give him additional aid, without in any respect depriving him of the benefit of any remedy or of any proceeding he was entitled to pursue before; and the very circumstance of the old judgment de retorno habendo remaining (which Bathurst, J. allows, and which is allowed on all hands, to be. the right judgment), notwithstanding the avowant has upon the verdict, and before the giving of that judgment, elected to proceed, and actually proceeded upon that statute, seems to shew that, as the old judgment of the common law was not gone or taken away by that election, so the consequences resulting from it still remained, if the avowant should have occasion, or should still chuse to crave them in aid. A subsequent case of Dunn v. Dunbar, in this Court, in Hilary term, in 1820, was cited. That was stated to be an action against the surety in a

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PERREAU v. Bevan. replevin bond after judgment in the replevin suit for the arrears of rent under the statute. On a motion by Mr. Marryat, to set aside the proceedings on the bond, because the surety is discharged by proceeding under the statute; and on citing Tidd's Practice, 1088, where there is a dictum to that effect but no reference to authority, Abbott, C.J., is stated in a note of that case, to have said, that the statutable remedy has not taken away the surety's responsibility, and in the absence of authority, the rule was refused, but if authority was found it might be mentioned Mr. Justice Best and myself, are stated to have been present. It does not appear to have ever been mentioned again; and supposing this to be a correct note of that case, and that it did not come on again, it is in support of our present opinion. The case, indeed, of Combes v. Cole (a), was cited, but that case was before the stat. 11 Geo. 2, when the avowant had no right to have the replevin bond assigned or delivered over to him, as he has since that statute; and that case, though it determined that the only mode of proceeding against the sheriff, before the stat. 11 Geo. 2 was in the mode there pointed out, does not establish that the proceeding under the stat. 17 Car. 2, without avail would have been a defence to an action on the replevin bond, if the sheriff had permitted the avowant to sue on it in his own name: or that, if it would, it would be so now, since the stat. 11 Geo. 2, c. 19; but if it would go to this extent, it has in effect been since overruled. But it has been urged, that upon the declaration in this case, it must be taken, that the breach assigned of the condition of this replevin bond, by which the plaintiff is damnified, is the not making of the distress as adjudged, and that he has proved no such breach without shewing a writ de retorno habendo, and a return of elongata thereon; as the declaration avers, that by the default of making such return, the bond became forfeited; but though it be true, that immediately after

(a) Cas. Temp. Hardw. 352.

stating such default, it says, "whereby the writing obligatory became and was forfeited," yet that word whereby is not confined, we think, to that immediately preceding allegation, but extends also to the prior averment of not prosecuting the suit with effect, so as to enable the plaintiff to recover upon the declaration, upon proof of facts sufficient to establish that as a breach, without going on to further proof which might have been necessary to establish the not returning the distress as a breach, in case no other breach than such non-return had been shewn by the declaration. The case of Charnley v. Winstanley, and wife (a), is applicable to this point. It was an action for breach of a covenant made by the wife dum sola in nonpayment of money pursuant to an award which she had covenanted to abide by and perform. It being alleged in the declaration, that the arbitrator had made his award after the intermarriage of the defendants, it was moved in arrest of judgment, that the award was void, the submission being revoked in law by the marriage; consequently, that no action would lie for the breach of the award, but the Court held, that the declaration [shewing a breach of the covenant by revocation of the submission by the intermarriage between the submission and the award], was valid and sufficient to support the action, though it was a breach of covenant informally and only impliedly alleged, and the declaration was evidently framed upon the idea, that the award was good, and meant to charge the non-payment of the money awarded as a breach of covenant, and the plaintiff had judgment. So in the present case, though the non-return of the distress may have been the thing intended, or mainly intended in the declaration, as the breach of the condition, yet if a breach of condition sufficiently appears by the declaration in another respect, namely, in not prosecuting the suit with effect, as we think it does, that is sufficient to support a verdict for the plaintiff, and entitle him to judgment thereon, though he fails in proving sufficient to establish the breach more pro-

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minently set forth. But then, it has been urged, that the plaintiff, upon the proof, has recovered greater damages than she was entitled to recover upon the form of the declaration, which, in setting out the proceedings and judgment in replevin, omitted to set forth the inquiry as to the arrears of rent, and the value of the distress, and the finding and judgment thereon: but that point does not appear to have been mentioned at the trial, nor was the rule, that I am aware of, moved on that ground. is, however, clear that the plaintiff is entitled to recover damages upon the merits if the declaration had stated the whole judgment, or if it should be amended in that respect on a new trial being granted, to the amount she has recovered, supposing her entitled to recover at all, and the objection, if it be one, arises only on the omission to state those parts of the proceedings in the declaration which are omitted. It is a mere objection of form, therefore; but supposing the defendant's counsel were not now too late to urge it, we think the declaration is sufficient to entitle the plaintiff to recover the damages she has recovered upon the proof given at the trial, which are less than the penalty of the bond, or the damages recovered by the judgment in replevin, inasmuch as the declaration states, that "by means of the loss of the bond, the plaintiff was prevented from obtaining an assignment of the bond, and from suing thereon, and deprived of the means of recovering the arrears of rent, and the costs of the action of replevin, and has been otherwise greatly injured and damnified." And the amount of that loss to the extent of the damages given by the jury, was proved by the judgment in replevin produced in evidence at the trial, though the whole of that judgment was not, and we think, need not, be stated in the declaration. We are of opinion, therefore, that the . rule must be discharged.

Rule discharged.

### DEAN v. BROWN, Esq., and others.

TRESPASS. by the plaintiff, trustee of Mary Ann Hall, the wife of William Hall, against the defendants, the sheriff of Middlesex and one of his officers, for seizing under a writ of fieri facias issued against William Hall, a horse and chaise, the property of the plaintiff, as such trustee. Plea, not guilty, and issue thereon. At the trial, before Abbott, C. J., at the adjourned Middlesex sittings after last Trinity term, the case was this:-Mrs. Hall, formerly Miss Tyler, before her marriage with tels," (specified in a scheartificial florist, and was possessed of the horse and chaise the horse and in question, which she, being lame, constantly used for the purpose of waiting upon her customers, receiving orders, and delivering goods. Previous to the marriage, a deed of settlement was executed by Miss Tyler, conveying to the plaintiff, as her trustee, "all and singular, the several articles of household furniture, plate, linen, goods, chattels, and effects, specified in a schedule indorsed upon marriage, she the deed, (in which schedule neither the horse nor chaise in question were included), and all her stock in trade, materials and other articles then belonging to her in and about her said business." Mrs. Hall continued to carry on her business after her marriage, and to use the horse and chaise as before; and her husband occasionally used them also. The formal parts of the case were not disputed. was contended on the part of the defendant, that the horse and chaise, not being inserted in the schedule indorsed on husband. the deed of settlement, did not pass to the plaintiff under the words "goods, chattels, and effects;" and that they could not be considered as "stock in trade, materials, or other articles belonging to Miss Tyler in and about her business;" and, consequently, that the action was not maintainable. The Lord Chief Justice left it to the jury

Saturday, April 22.

A feme sole trader who kept a horse and chaise to visit her customers, before marriage, by deed conveyed to trustees "all her household furniture, goods, and chatdule in which chaise were not included), and "all her stock in trade, materials, and other articles, belonging to her, in and about her said business."After used the horse and chaise as before :-Held, that the horse and chaise passed to the trustees by the deed, and were not liable to be It taken in execution for the debts of her

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to say, whether, at the time when the deed of settlement was executed, the horse and chaise belonged to Miss Tyler "in and about her business." The jury found that they did, and thereupon, by the learned Judge's direction, returned a verdict for the plaintiff. In Michaelmas term last, a rule nisi for setting aside the verdict and entering a nonsuit having been obtained,

Scarlett and Comyn, now shewed cause. The deed conveyed to the plaintiff, as the trustee for Miss Tyler, every thing that belonged to her in and about her business. The evidence shewed, and the jury have found, that the horse and chaise then belonged to her in and about her business. That was a mere question of fact peculiarly for the jury to decide; it has been properly left to them; they have decided it; and the plaintiff, therefore, is entitled to retain the verdict which, under such circumstances, has been found in his favour. The husband having occasionally used the horse and chaise, can make no difference in the case, because that must be taken to have been done by the permission of the wife, or her trustee: besides, it has been held, that the possession which a husband, living with his wife, has of the separate property of the wife, settled before marriage in trustees for her separate use, is not sufficient to bring a case within the Bankrupt Acts; and that it is no objection to such a settlement, that the goods were not described in the deed, or referred to in the schedule annexed; Jarman v. Woolloton(a).

Gurney and Holt, contrà. The question now before the Court depends upon the construction of the deed of settlement, and is, therefore, a question of law and not of fact. Now, looking at the language of the deed, this property could not possibly pass under either of the descriptions there given; it could not pass as "goods, chattels, and effects," because it is not inserted in the schedule;

(a) 3 T. R. 618.

nor as "stock in trade, materials, and other articles in the business," because it is of a nature utterly inconsistent with all those expressions. The "stock in trade," being fluctuating and variable in its nature, required no schedule, for which reason none was given; therefore, the "materials and other articles" next mentioned, must have meant articles ejusdem generis: but the property in question is of a permanent nature, and would certainly have been in fact, as it clearly ought to have been by law, inserted in the schedule, if it had been intended to pass to the trustee.

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BAYLEY, J.—All articles of property, "belonging to Miss Tyler, in and about her business," are clearly included in the deed of settlement. The jury have found, that the property in question did belong to her in and about her business; and it is impossible for us upon the evidence before us, to find the contrary: especially as the fact of her being lame, and the nature of her business, which would take her much from home, must render such property highly useful, if not absolutely necessary to her. Such articles, at first sight, do not appear peculiarly applicable to such a business; but still, if they were, under the peculiar circumstances I have mentioned, honestly and bona fide kept and used for the purposes of trade, and not for pleasure, I have no hesitation in saying in point of law, that they would pass to the trustee by the deed. The jury have, in effect, found that the horse and chaise were kept for the purposes of trade, and not for pleasure; and there is no evidence to shew that there was any other property belonging to Miss Tyler, which could answer the description of "other articles," following the words "stock in trade" in the deed. I am, therefore, of opinion, that the verdict was right, and that this rule ought to be discharged.

HOLBOYD, J., concurred.

LITTLEDALE, J., was in the Bail Court.

Rule discharged.

Saturday, April 22d.

Edwards v. — Lucas, Esq. and another.

Declaration in case, for a false return to a writ of fi. fa., stated "that plaintiff by the judgment of the Court recovered 39l. 10s., adjudged to him for his damages by him sustained, as well by occasion of the not performing several promises, as for his costs," &c; concluding with a prout patet per recordum. Upon production of the judgment it appeared, that a remittitur had been entered as to all the counts in the declaration except the first, and that the damages were awarded for the not performing the promise in that count mentioned only:--Held, a fatal variance.

THIS was an action on the case, against the defendants, the late sheriffs of London, for a false return to a writ of fieri facias issued against the goods of A. B., upon a judgment recovered against him by the plaintiff. Plea, not guilty, and issue thereon. The description of the judgment in the declaration was, "that by the judgment and consideration of the Court, the said plaintiff recovered against the said A. B., the sum of 391. 10s., which was adjudged to him for his damages by him sustained, as well by occasion of the not performing the said several promises and undertakings before that time made by the said A. B. to the said plaintiff, as for his costs," &c.; with a prout patet per recordum. At the trial, before Abbott, C. J., at the London adjourned sittings after last Trinity term, upon producing the record of the judgment, it appeared, that a remittitur had been entered as to all the counts in the declaration, except the first, and that the damages were awarded for the not performing the promise and undertaking in that count mentioned only. It was contended on the part of the defendants, upon the authority of Baynes v. Forrest (a), that this was a fatal variance between the judgment as set out on the record, and as produced in evidence, and that the plaintiff, therefore, must be nonsuited. The Lord Chief Justice declined to nonsuit, but reserved the point, and the plaintiff had a verdict, with liberty to the defendants, to move to enter a nonsuit.

Gurney, in Michaelmas term last, having moved and obtained a rule nisi, accordingly,

Hutchinson now shewed cause. The case of Baynes v. Forrest, upon the authority of which this rule was granted, is distinguishable from the present in two respects. First,

(a) 2 Str. 892.

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that was a proceeding by scire facias upon a judgment, which was stated on the record to be for damages for the non-performance of a certain promise and undertaking, but which when produced in evidence appeared to be for damages for the non-performance of several promises and undertakings; so that the averment there could not be proved, without severing the damages, which could not be Second, the judgment there was of the very essence and foundation of the action; and therefore without strict proof of the judgment as declared upon, the action could not be maintained. Here, the averment may be proved without severing the damages, and the judgment is mere matter of inducement; therefore, evidence that a judgment was recovered for the sum of 391. 10s., supported the averment, and was sufficient to maintain the action, King v. Pippett (a), Hamborough v. Wilkie (b): and if so, the judgment being pleaded with a prout patet per recordum makes no difference, Stoddart v. Pallmer (c).

Gurney and Chitty, contrà, having contended that this case was not distinguishable from Baynes v. Forrest, that the judgment was of the essence of the action, and that the rule of distinction laid down in Purcell v. Macnamara (d), applied; were stopped by the Court.

ABBOTT, C. J.—I am clearly of opinion that the rule for entering a nonsuit in this case ought to be made absolute. Some judgment recovered, was an essential constituent part of the plaintiff's right of action. He undertook, and he was bound, to set out in his declaration such a judgment as warranted the issuing of the writ of fieri facias; and it was his duty to set it out correctly. He averred the judgment to be for damages for the not performing several promises; it appeared upon production, to be for damages for the not performing one promise. It was im-

<sup>(</sup>a) 1 T. R. 235.

<sup>(</sup>c) Ante, vol. iv., 624. 3 B. & C. 2. S.C.

<sup>(</sup>b) 4 M. & S. 474.

<sup>(</sup>d) 9 East, 157.

CASES IN THE KING'S BENCH,

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material to the defendants, whether the judgment was for the non-performance of several promises, or of one only; but it is most material that the plaintiff should set out the judgment as it-really was. If we were to hold this declaration to be good, we might with equal propriety be called upon to hold that an averment of a judgment recovered in assumpsit would be satisfied by evidence of a judgment recovered in covenant or in tort. I think that would be going very dangerous lengths, and that we shall be keeping the prudent course, and best consulting the interests of the public, by holding that this is a fatal. variance.

BAYLEY J.—It is quite clear that the plaintiff could not recover without setting out such a judgment as warranted the fieri facias; and if so, it is equally clear that he must set out that judgment correctly.

HOLROYD, J., concurred.

LITTLEDALE J., was in the Bail Court.

Rule absolute.

Monday, April 24th.

DOE d. TURNBULL and others v. Brown.

Where a cause was referred to arbitration by an order at Nisi arbitrator after entered. a notice of revocation in an award directing a

BY an order of Nisi Prius, made at the summer assizes for the county of Cumberland, in the year 1824, this ejectment was referred to the arbitration of a barrister, with Prius, and the power to him to direct in what way the verdict should be No award having been made by him in April. 1825, the lessors of the plaintiff, by a notice in writing, writing, made revoked the submission. Notwithstanding this, the ar-

verdict to be entered for the defendant, the Court set the award aside, even assuming it to be a nullity.

bitrator proceeded in the reference, and in the month of August following published his award, directing a verdict to be entered for the defendant. In Michaelmas term last, a rule nisi was obtained for setting aside the award, on the ground that it had been made after the revocation of the arbitrator's authority.

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Patteson now shewed cause. The question is, whether a simple revocation in writing, is sufficient to determine an arbitrator's authority under an order of Nisi Prius, made under the sanction of the Court in which the cause is brought on for trial. It is contended, that an order of Nisi Prius is of so high a nature, that the authority given by it cannot be revoked by a mere notice in writing. A submission by deed can only be revoked by deed, and it is clear that if this had been a submission by deed under seal, the mere notice in writing, not under seal, would be insufficient to revoke the arbitrator's authority, Marsh v. Bulteel (a). An order of Nisi Prius is something intermediate between a mere agreement and a submission by deed, but still it is contended, that it could only be revoked by deed. Admitting, however, that the revocation in this instance was sufficient to determine the arbitrator's authority, then it follows that the award is void, as a nullity, and this application to set it aside, is unnecessary. this, King v. Joseph (b), is an authority. In Clupham v. Higham (c), undoubtedly the court of Common Pleas did set aside an award made under an order of Nisi Prius, after the revocation of a submission, but nothing is at all said by the Court there, as to the award being void in itself.

ABBOTT, C. J.—Surely this matter is very plain. If an award is a nullity, or is of such a nature that nothing can be done upon it, but by suit at law, the Court

<sup>(</sup>a) 5 B. & A. 507. 1 D. & R.

<sup>(</sup>b) 5 Taunt. 453.

<sup>106.</sup> 

<sup>(</sup>c) 7 J. B. Mo. 403. 1 Bing. 87.

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does not interfere to set it aside, because if any suit were brought upon it, it must fail. But in this case the award orders a verdict to be entered for the defendant, who, unless we interfere to prevent it, may enter up judgment and take out execution. This case is distinguishable from those cases where the award is such, that nothing can be done upon it but by suit at law. It appears to me, therefore, that we ought to set this award aside.

HOLROYD, J.—I am of the same opinion. I think we ought not to allow this award to stand, inasmuch as it would be conclusive on the plaintiff.

LITTLEDALE, J., concurred.

BAYLEY, J., was gone to chambers.

Rule absolute.

E. Alderson was to have argued for the plaintiff.

Monday April 24th.

W. F. BERKELEY, Esq. v. HARDY.

to an agent to seal, must also

The execution of an in-

attorney, must be in the name of the principal, in order to be binding upon the latter.

An authority THIS was an action of covenant upon an indenture of execute an in- lease, to which the defendant pleaded non est factum. denture under The cause, and all matters in difference between the parbe under seal. ties, were referred to a gentleman at the bar, who by his award determined, that the plaintiff had no right of action denture by an upon the covenant. On shewing cause against a rule nisi

A deed inter partes can only be available between the parties thereto; therefore, where in covenant upon an indenture of lease, it appeared, that the landlord by writing not under seal, authorised his attorney to execute the lease for and on his (landlord's) behalf, and the attorney signed and sealed the lease in his own name:-Held, that the landlord could not maintain covenant against the tenant upon the indenture, although the covenants were expressly stated to have been made by the tenant, to and with the landlord.

for setting aside this part of the award, it appeared from the affidavits, that the action was brought upon certain indentures which were on the 24th July, 1822, signed, sealed, and delivered, by one James Simmonds, for and on behalf of the plaintiff, and by the said defendant, respectively; the said J. S. having been theretofore authorised by the plaintiff by writing, under his hand, but not under seal, to execute the same for him and on his behalf, the beginning of which said indentures was as follows:---" Agreed, the 24th July 1822, between James Simmonds, for and on behalf of William Fitzharding Berkeley, commonly called Earl Berkeley, (the plaintiff), of the one part, and Joseph Hardy, (the defendant), of the other part, as follows:—The said W. F. Berkeley agrees to let, and the said J. Hardy agrees to take, all those messuages. tenements, farms, and lands," &c. The indenture then contained certain covenants, for the breach of which this action was brought; which covenants were expressed to be made by the defendant to the plaintiff, and by the plaintiff to the defendant. The name of James Simmonds did not appear again in the lease, after the commencement, until the conclusion, which was in the following terms:-" In witness whereof we have hereunto set our hands and seals, the day and year above written, James Simmonds, (LS.); Joseph Hardy, (LS.)." The affidavits then stated, that the arbitrator had found that the defendant Hardy had committed certain breaches of covenant, and assessed the damages at 2801. They then proceeded to set out the parts of the award, upon which the question intended to be brought before the Court was raised, as follows:—"But it having been objected on the part of the defendant, that the said W. F. Berkeley was not entitled in law to maintain any action of covenant in his own name, upon the indentures; and it appearing to me, that such objection to the form of the action is well founded, I do hereby order and adjudge, that the said W. F. Berkeley, is not entitled to recover his said damages in such action

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1826. Berkeley v. Hardy. of covenant." The other parts of the award not being material to the present question, it is unnecessary to set them out. The question was, whether the arbitrator had properly determined that the plaintiff was not entitled in law to maintain any action of covenant, in his own name, upon the indentures.

Tindal and Coleridge now shewed cause against the rule. From the statement of the facts found by the arbitrator, and disclosed in the affidavits, it is clear that no action of covenant could be maintained on the indenture in the name of the plaintiff. First, this manifestly cannot be considered as his deed, for it is found by the arbitrator that Mr. Simmonds had no authority under seal to execute the deed for Mr. Berkeley. It is a settled principle of law, that the authority of an agent to execute a deed which is to bind his principal, must be equally as strong as that by which the agent purports to bind the interests of his Here the authority being only under hand, principal. and not under seal, the power delegated to Mr. Simmonds does not bind the plaintiff; White v. Cuyler (a), Horsley v. Rush, cited in Harrison v. Jackson (b), Williams v. Walsby (c), Steiglitz v. Egginton (d). Secondly, assuming that Mr. Simmonds had sufficient authority to bind the plaintiff, still the deed is not so executed as to bind the latter. The regular mode of executing such an instrument by attorney, is to execute it in the name of the principal. From the time of Lord Coke, in Combe's case (e), down to the recent case of Barford v. Stuckey (f), this has been the settled rule. Here the deed is executed in the name of Simmonds only, and not that of the plaintiff, which is a clear objection. Thirdly, it is also a general

<sup>(</sup>a) 6.T. R. 176.

<sup>(</sup>b) 7 T. R. 209.

<sup>(</sup>c) 4 Esp. 220.

<sup>(</sup>d) Holt's N. P. C. 141.

<sup>(</sup>e) 9 Rep., 2d resolution.

<sup>(</sup>f) 5 J. B. Moore, 23. 3 B.
& B. 333. See Frontin v. Small,
2 Ld. Raym. 1418; and Wilks v.
Back, 2 East, 142.

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rule, established in a great variety of cases, that a deed inter partes is only available between those who are parties to it, and therefore as the plaintiff is no party to this deed, he can maintain no action upon it. The case of Barford v. Stuckey last cited, is a decisive authority on this point. That decision was only, however, in furtherance of what is laid down in Scudamore v. Vandenstene (a), which was an action of debt on a charter party, and a distinction was taken between an indenture reciprocal, between parties of one part, and parties of the other part, in which case no obligation, covenant, or grant, can be made to or with any who is not party to the deed. This doctrine was also recognised in Storer v. Gordon (b), where it was held that a deed between A. of the one part, and C. of the other, whereby A. agreed to annul certain claims he had against B, could not be pleaded by B, in an action against him by A., brought to enforce those claims. This distinction is familiar in an action of covenant, and is equally so in debt, as was decided in the former case of Scudamore v. Vandenstene. It is admitted that the same rule does not hold in the case of a deed poll. The case of Clement v. Henley (c) would seem, at first sight, to militate against the doctrine now contended for. In that case two joint covenantees sued upon an indenture executed by one of them only, and it was held that the action was maintainable, but it was on this express ground, that the plaintiff who did not execute, was still a party to the deed, and as the covenantor had executed to him as well as the other plaintiff, both might well sue. That case, therefore, does not help the difficulty in which this plaintiff is placed, because he is a stranger to the deed altogether. The only case which throws a doubt upon this point, is Gilbey v. Copley (d), but in that case there was not any decision, three of the Judges differing in opinion from Levinz, J., who said " that it was common erudition, that one not party to a

<sup>(</sup>a) 2 Inst. 673. 2 Rolle's Abr. (c) 2 Rolle's Abr. 22, Faits (F) title Faits (F) 1.

<sup>(</sup>b) 3 M & S. 308.

<sup>(</sup>d) 3 Lev. 138.

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deed, made inter partes, cannot take by the deed, unless by way of remainder" (a). Besides, in Gilbey v. Copley, the promise was general, and not to any person certain, although the payment was to be made to the plaintiff. The case of Salter v. Kidgley (b) is distinguishable from this, because that was the converse of this case, inasmuch as there the action was brought by a party to the deed against one who was no party, but had executed it, and that fact was distinctly noted by Holt, C. J., who said, " one who is party to a deed cannot covenant with another who is no party. but a mere stranger to it; but one who is no party to the deed may covenant with another that is a party, and thereby oblige himself by sealing the deed." This, therefore, being a deed inter partes, and the plaintiff not being a party to it, on the authority of the cases cited, he can maintain no action on this indenture.

W. E. Taunton, and Campbell, contra. The question in this case is, whether there was any covenant from the defendant to the plaintiff. It must be admitted, that the rule of law which requires that an attorney must execute a deed in the name of his principal, is too inveterately settled to be now controverted. Nor can it be disputed, that the cases have established a distinction between deeds inter partes and deeds poll. Neither can it be denied, that a person who is no party to a deed, and is a mere stranger, cannot maintain covenant against one who is a party. But it is submitted, that, notwithstanding these concessions, this action may be maintained by Mr. Berkeley. appears, from the finding of the arbitrator, that Mr. Simmonds was not empowered to execute the lease by an instrument under seal, and the arbitrator seems to have considered that as the sole objection to the plaintiff's right of recovering. Now, it is not disputed, that, in most instances, where an attorney is to bind his principal by deed, the instrument under which he acts must also be by deed:

<sup>(</sup>a) See Cooker v. Child, 2 Lev. 74. (b) Carth. 76.

but there is a great difference between the cases where the principal parts with an interest, and where he merely gives an authority. It is laid down in Co. Litt., 52 b, that an attorney, to deliver seisin, must be by deed; but in the case of Moyle v. Ewer (a), where an indenture of bargain and sale between I. S. of the one part, and I. D. of the other part, and in the end thereof a letter of attorney to I. N., to make livery, was produced in Court, and it was urged, that it should be void, because the attorney was no party to the deed the Court held it well enough. [Abbott, C. J. Livery of seisin is not in execution of the law; it is a matter in pais]. This is also a matter in pais; the execution of a deed is stated in the books to be a matter This is a mere authority, given by the plaintiff, to Mr. Simmonds. The case, then, depends, in a great measure, upon the terms in which the authority is executed. This is not an agreement on the part of Mr. Simmonds to let the premises to the defendant; but it states in terms, that "the said William Fitzharding Berkeley agrees to let, and the said John Hardy agrees to take, all those messuages, tenements, farms, lands," &c. Therefore, in the contracting part of the instrument, every thing purports to be granted by the plaintiff to the defendant, and the covenants purport to be from the defendant to the plaintiff. This case, therefore, is distinguishable from that of Frontin v. Small, because there the attorney professed But, admitting the to do every thing in his own name. authority of that case, and of the others upon this point, the argument on the other side may be prayed in aid to shew, that the intervention of Simmonds, and the execution of the indenture by him, are to be considered, as far as they go, as mere nullities. If so, the words at the beginning of the agreement, purporting that the instrument had been made between him and the defendant, and the concluding words, whereby Simmonds professes to execute, may be altogether rejected; and then it may be treated as

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(a) Noy, 49. Cro. Eliz. 905.

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a deed poll, executed by the defendant alone. [Holroyd, J. If you argue that it is to be considered as a deed poll simpliciter, then there is no demise; for, according to the case of Frontin v. Small, where the attorney professed to execute in his own name, and the deed was on that ground held to be void; it followed as a consequence that the covenants were also void. Here the foundation of the covenants, is the demise, and if there be no demise, there can be no covenants with the plaintiff]. It is submitted, that this may be supported as a deed poll, on the authority of Cooker v. Child (a), and Gilbey v. Copley (b). Now, if it be true that Simmonds is not to be considered as the legal attorney of the plaintiff, and there be no execution by the plaintiff, still, as the defendant, by his execution, agrees to take the land, and expressly covenants to pay the plaintiff the rent, it follows that he would be liable to the plaintiff in this action.— [Holroyd, J. That argument would equally have applied in the case of Frontin v. Small]. Here the lessee expressly covenants to pay the lessor. [Abbott, C. J. Now supposing you treat the first clause of this indenture, as an agreement between the plaintiff and the defendant, can you contend that it would be valid if the plaintiff did not execute it? Suppose the name of Simmonds to be left out altogether, and that we are to regard this as an agreement between the plaintiff and the defendant, could the plaintiff have alleged that he had demised the premises to the defendant. If he could not allege that he had demised, he clearly could not maintain covenant]. The defendant would be bound to pay the rent to the plaintiff, and if so, that must be on the footing of a demise. [Abbott, C. J. This might make a tenancy from year to year, but it will not make a demise so as to support an action of covenant upon the indenture. But if the defendant has entered as tenant to the plaintiff upon the terms and conditions mentioned in the indenture, is he not estopped from availing

himself of this objection? [Abbott, C. J. If this could be treated as the execution of a counterpart by a lessee, as against him, it would be presumptive evidence until the contrary be shewn, that there had been a valid execution of an original]. Certainly the case must turn at last upon the point last suggested by the Court, for it must be admitted, that no action could be maintained against the. plaintiff, and consequently, if he is to be treated as a stranger to the deed, he could maintain no action upon it: and the question is, whether it may not be well presumed, that there was another instrument executed by the plaintiff, whereby the term was created, and that the instrument in question, is in the nature of a counterpart of an original indenture properly executed. Treating the case in this way, all the difficulties suggested on the other side, may be avoided.

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ABBOTT, C. J.—I know of no instance in which, in the case of an action brought upon an imperfect and invalid agreement, the Court has presumed the existence of another instrument free from objection; and in the absence of express authority, it would be going farther than the doctrine of presumption has ever yet gone, if we were to presume the existence of such an instrument in this case, especially where the whole matter was before the arbitrator, and the existence of such an instrument, was never suggested. We are therefore to decide this case upon the technical rule of law, applicable to deeds under seal, which I believe is peculiar to the law of England. That rule is laid down and established in so many cases, which cannot be now controverted, that I think we are bound to hold, that no action of covenant can be maintained upon the deed in question, in the name of this plaintiff, and consequently, that we ought not to set aside this award.

HOLROYD, J. (a)—The form of this deed, and the man-(a) Bayley J., was in the Bail Court. BERKELEY
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ner in which it was executed, rebut the presumption that there had been originally a deed properly executed, and that this was merely a counterpart. From the beginning to the end, this instrument does not appear to be well executed as an indenture of lease to the plaintiff, and therefore, as there was no demise on his part, it follows, that there were no covenants by the defendant for the breach of which an action could be brought in the name of Mr. Berkeley.

LITTLEDALE, J., concurred.

Rule discharged.

Tuesday, 25th April.

CLAYTON v. Gosling.

Where the maker of a promissory note, payable 12 months after notice, with interest, " for value received," became bankrupt before notice had been given :-Held, that the note was within the 7 G.1, c. 31, and proveable under his commission.

ASSUMPSIT on a promissory note in these words:—
"30th December, 1820. On having twelve months' notice, we jointly and separately promise to pay Mr. John Clayton, or order, 2001., for value received, with lawful interest. G. Gosling, J. D. Bower." Pleas, first, the general issue, non assumpsit; and second, the bankruptcy of the defendant. At the trial, before Hullock, B., at the Derbyshire spring assizes, 1825, the plaintiff obtained a verdict for the amount of the note, subject to the opinion of the Court, on the following case.

The name of G. Gosling on the note was proved to be the hand-writing of the defendant. The defendant became bankrupt in 1821, and a commission was issued against him, bearing date, 25th October in that year; and on the following day, a notice was given to him by the plaintiff, to pay, in twelve months, the 2001. and interest secured by the note; and a similar notice was given to

Joshua Dale Bower, of Chesterfield, the place where the plaintiff and defendant resided. No evidence was given as to whose hand-writing the name J. D. Bower, signed to the note, was; but it was proved that there was no person, either in Chesterfield, or in the neighbourhood, answering the description of J. D. Bower, except the Joshua Dale Bower, to whom the notice was given. The defendant's certificate was dated 29th April, 1824.

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N. R. Clarke, for the plaintiff. The verdict ought not to be disturbed. The note was not proveable as a debt under the defendant's commission; an action upon it, therefore, is not barred by the defendant's certificate. general plea of bankruptcy must, in all cases, state, that the cause of action accrued before the time when the defendant became bankrupt; Charlton v. King (a); which the plea in this case could not state, or, at least, could not state truly: because no cause of action could accrue until after notice had been given, and no notice was given until after the bankruptcy. The only cause of action that could accrue before the bankruptcy, was default in payment after notice; but the defendant had been guilty of no default, because he had received no notice. There was no debt payable at all events, for it depended upon the contingency of notice being given; and it might, in fact, never become payable, for the notice might never be given. It was, therefore, a contingent debt; and contingent debts are not proveable under a commission: Hancock v. Entwisle (b), Utterson v. Vernon (c). itself cannot be regarded, necessarily and conclusively, as evidence of a debt in præsenti. It cannot be said that this case comes within the principle of the 7 Geo. 1, c. 31, for the preample of that act clearly shews that it was intended to apply exclusively to cases relating to trade; and the provision for deducting a rebate of interest makes it

<sup>(</sup>a) 4 T. R. 156.

<sup>(</sup>b) 3 T. R. 435.

<sup>(</sup>c) 4 T. R. 570.

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equally plain, that the legislature intended to allow the proof of such debts only as were payable at all events on some specific day. Ex parte King (a).

S. M. Phillips, contrà. The note was proveable under the commission; therefore the plea of bankruptcy is an answer to the action. This is a case within both the letter and the spirit of the 7 Geo. 1, c. 31. The note constituted, and was conclusive evidence of, a debt in præsenti. expressed to be "for value received." It was not payable upon any contingency, for it was in the power of the payee at any moment to fix the time of payment; and id certum est quod certum reddi potest. The cases cited on the other side, therefore, do not apply; for in all of them there was some contingency; either the amount of the debt was not ascertained, or the period of the payment was uncertain, and independent of the will and power of the creditor. Here the amount of the debt was ascertained; and it depended only upon the will, and was within the power of the creditor to fix a day for the payment.

ABBOTT, C. J.—We have, more than once, of late decided, that the words "value received," in a promissory note, mean "value received from the payee" (b), and conformably with those decisions, we must read the note in question thus:—"We acknowledge to owe Mr. Clayton (the payee) 2001, and promise to pay him that sum, with lawful interest, twelve months' after notice." If that is the effect of the note, as I think it is, the debt is not contingent, for that is admitted to be due; nor is the time of payment contingent, in the strict sense of the word, for that would be a time which might never arrive: but we must presume, from the very circumstance of the note being given, that the period at which it is made payable would

<sup>(</sup>a) 8 Ves. Jun. 334. ante, vol. iii., 165. 1 B. & C. (b) See Highmore v. Primrose, 674. 5 M. & S. 65. Priddy v. Henbrey,

arrive. The notice specified in the note was not given till after the bankruptcy; therefore, the plaintiff had no cause of action at the time of the bankruptcy. The statute 7 Geo. 1, c. 31, was passed for the purpose of remedying that very evil, and provides, first, for the proof of debts payable in futuro; and secondly, for a rebate of interest on debts so proved. The question, then, is, whether such a rebate of interest can be made in this case; and I am of opinion that it can. The interest ceases from the time of the bankruptcy, and then the note becomes the same as if it had been made payable at a certain period from its date. Removing by these means the difficulty which might have arisen respecting the rebate, if the note had not carried interest, it seems to me that the case comes within the spirit of the act of parliament, that the debt was proveable, and, consequently, that the plea of bankruptcy is an answer to the action. I am, therefore, of opinion, that the defendant is entitled to judgment.

BAYLEY, J.—Where the amount of a debt is uncertain, or the period at which it is payable is contingent, it is quite clear that it is not proveable under a commission. where there is an existing debt previous to the commission. · payable in futuro, and the amount of it is ascertained, it is within the 7 Geo. 1, c. 31, and proveable. note in this case is made " for value received," which, according to the modern decisions upon this subject, amounts to an acknowledgment of a debt due. The only possible contingency here is, as to the time when the note shall be payable; but that is, in fact, no contingency at all; for it is payable twelve months after notice, which we must presume would be given; and the statute proceeds expressly upon the distinction between debts due and debts payable. If interest had not been payable from the date of the note, but only from the time of the notice, then, no notice having been given at the time of the bankruptcy, the amount of

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the debt might have been doubtful: but as interest is pay-

1826: CLAYTON v. Gosling arise. It seems to me, therefore, that this was a debt proveable within both the letter and the spirit of the 7 Geo. 1, c. 31; and that the defendant having obtained his certificate, the action is not maintainable.

HOLBOYD, J, and LITTLEDALE, J., concurred.

Judgment for the defendant.

Tuesday, 25th April. Where an affidavit answered a rule nisi for setting aside proceedings for irregularity, with costs, but was written in a cramped and slovenly hand, the Court on that ground refused to grant the costs of the application.

## BANE v. Jones.

ON shewing cause against a rule for setting aside the judgment and execution upon a warrant of attorney, with costs for irregularity; the application was answered upon the merits, but the affidavit produced on the part of the plaintiff, being written in a very small cramped hand, closely written, and shewing great parsimony in the use of paper, the Court, for that reason, said, that although the rule was moved with costs for irregularity, and was answered on the merits, they would not discharge the rule with costs, and

ABBOTT, C. J. said, This affidavit exhibits a very disgraceful performance. The Court has often had occasion to complain of the slovenly and almost illegible manner in which affidavits are written, thereby giving the Court an infinite degree of trouble, when brought under our inspection. By way, therefore, of shewing our disapprobation of putting such an affidavit as this upon the files of the Court, we shall discharge this rule, but not with costs, which we should otherwise have done. This, I hope, will be a good lesson to teach people they are not to write in a way unfit to be read.

The other Judges concurred.

Crowder for the plaintiff, and Campbell for the defendant.

Rule discharged without costs.

Tuesday, 25th April.

## Ex parte WILLIAM EDWARDS.

THE defendant, William Edwards, had been convicted by two justices, of an offence against the Smuggling Act, under the Geo. 4., c. 108, s. 80, and being a seafaring man was adjudged to be sent on board one of his Majesty's ships, c. 108, s. 81, in order to his serving in the navy for the term of five years, and having been accordingly carried on board H. M. S. Victory, and there refused to be received on account of unfitness, he was brought back before the same justices, to be dealt with in the manner directed by sec. 81. By that section, it is enacted "that if any person so convicted as a seaman, and carried on board any of his Majesty's ships of war, shall, on examination by any surgeon of his Majesty's navy, within one week after being amined by a so carried on board, be deemed to be unfit, and shall be refused on that account to be received into his Majesty's refusal to be service, such person shall be conveyed before two justices, the service: and upon proof that he has been so refused to be received, such justices are authorised and required to call upon the shew, in terms, said person to pay the penalty of 100l., without hearing any evidence, other than such proof as last aforesaid, and "called upon in default of immediate payment of the same, to commit the said person to prison, there to remain until such penalty shall be paid." Under the authority of this section, the justices committed Edwards to prison until he paid the penalty of 1001. The statute gives no form of commitment in a case circumstanced as this. The justices in the warrant, by which Edwards was so committed, recited the former warrant of commitment, under which he had been sent on board the Victory, and the fact that he had been refused to be received on board that vessel, and concluded with a direction that he should remain in prison until the penalty of 1001. was paid.

Platt now moved for a writ of habeas corpus, for bringing the prisoner Edwards up, in order to be discharged

A warrant of commitment Smuggling Act, 6 G. 4, of a person who had been refused to be received on board a ship of war, as unfit for the naval service] until he paid the penalty of 100%, need not shew that he had been exsurgeon, as the ground of the received into nor need the commitment that the party had been to pay the penalty," before he was committed.

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from the commitment, and took two objections to the warrant, 1st, That it did not appear on the face of it, that the prisoner had been examined by a surgeon, in pursuance of s. 81; and 2d, That it did not shew that the prisoner had been called upon to pay the penalty before he was committed. This act, he contended, ought to be construed most strictly in favour of the subject. As to the first objection, s. 81 made it a condition precedent, that the party should be examined by a surgeon before the justices could have jurisdiction to commit him until he paid the penalty; and, therefore, as the warrant did not shew that such examination had taken place, every intendment must be made against the commitment. Then, secondly, s. 81, in express terms, required that the justices should call upon the party after he was sent back, to pay the penalty imposed, and in default of immediate payment, commit him until the penalty should be paid. Now, here there was nothing upon the face of the warrant to shew that the party had been called upon, in the terms of the act, to pay the penalty before he was committed. For these reasons, he submitted that the party was entitled to be discharged.

ABBOTT, C. J.—I think neither of these objections is tenable. In the case of a person deemed unfit, and refused on that account to be received into the naval service, proof that he has been so refused to have been received, is all that is requisite to give the justices jurisdiction to commit for the penalty under the 81st section; and I think they are not bound to set out the fact that the party has been examined by a surgeon. Then, as to the second objection, I think, that adjudging this party to pay the penalty, is equivalent to demanding it. The justices have adjudged him to pay, and he has not paid; that is the same thing as calling upon him to pay. The warrant, therefore, appears to me to be substantially good.

The other Judges concurred.

Writ refused.

## The King v. the Justices of Middlesex.

ON appeal against a conviction under the 57 Geo. 3, c. 29. "An act for better paving, improving, and regulating the streets of the metropolis, and removing and preventing nuisances and obstructions therein," the Quarter Sessions for the county of Middlesex confirmed the conviction, subject to the opinion of this court, upon a case granted for that purpose. By sec. 135, it is enacted, that no proceeding to be had touching the conviction of any offender or offenders against that act, shall be vacated or quashed for want of that a case form; "nor shall any rate, proceeding, conviction, matter, or thing, be removed or removeable by certiorari or by any the opinion of other writ or process whatsoever, into his Majesty's courts of record at Westminster, or elsewhere; any law, statute, or of a conviction usage to the contrary notwithstanding."

Tindal now moved for a writ of certiorari to remove into 135, and could this court the case which the sessions had granted, and contended, that the 135th section did not prevent the removal of a special case into this court for its opinion. special case not being specifically mentioned in that clause, and the certiorari being a beneficial writ for the subject, it could not be taken away without express words. He therefore submitted that the certiorari was not taken away in this instance; and he referred to Rex v. Jukes (a), where it was held, that if a statute authorising a summary conviction, before a magistrate, give an appeal to the sessions, who are directed to hear, and finally determine the matter, this does not take away the certiorari, even after such appeal made and determined.

ABBOTT, C. J.—The language of the section in question. is too strong to be got over. It restrains the removal by

(a) 8 T. R. 542.

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The Metropolitan Paving Act, 57 G. 3, c. 29, s. 135, prevents the removal into the superior courts, of " any rate, proceeding, conviction, order, matter, or thing:"-Held granted by the sessions for this court, upon the affirmance under the act. was a thing, within the meaning of s. not be removed by certiorari.

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certiorari of any rate, proceeding, conviction, order, matter, or thing. These words are clearly comprehensive enough to embrace a special case, for it cannot be denied that a special case is a thing. Nothing can therefore be taken by your motion.

The other Judges concurred.

Rule refused.

Wednesday, 26th April.

A husband is liable for necessaries supplied to his wife pending a suit between them in the ecclesiastical court, until alimony is assigned: nor does a decree, directing the. alimony to be paid from a date preceding the necessaries were supplied, remove his liability.

## KEEGAN v. SMITH.

ASSUMPSIT, to recover the sum of 311. 6s. 2d., for board, lodging, and necessaries, furnished to the wife of the defendant, from the 19th July, to the 8th November, 1824. Plea, non assumpsit, and issue thereon. trial, before Abbott, C. J., at the adjourned Middlesex sittings after last Trinity term, the plaintiff's case being admitted, the following was the defence set up. February, 1824, the wife of the defendant, they being then living separate, instituted a suit in the consistory court against him, for restitution of conjugal rights; and in the time when April, 1824, another suit for a divorce, on the ground of cruelty and adultery. On the 3rd of December, 1824, the Court issued a decree in the latter suit, ordering, that the defendant should allow his wife, pendente lite, 301. a year, payable quarterly, to commence from the 8th of March preceding. It was not clearly proved that any part of the allowance had ever been paid; but the registrar of the court stated, that in default of payment a monition might have issued within fifteen days after the decree, and that in point of fact no such monition ever did issue. The Lord Chief Justice was of opinion, that, even assuming the alimony to have been regularly paid from the 8th of March, 1824, still as the decree was made subsequently to the period in respect of which the plaintiff's demand arose, it was no answer to the action. His Lordship, therefore, directed a verdict to be entered for the plaintiff, with liberty for the defendant to move to enter a nonsuit. A rule nisi having been obtained accordingly in *Michaelmas* term last.

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Denman, C. S., and Maule, now shewed cause. The husband is not relieved from liability in this case. The wife was destitute, and was driven to the consistory court for relief. She was not to be left to perish in the interval between her separation from her husband, and the issuing of the decree which assigned her alimony. Her debt to the plaintiff was contracted during that interval, and at a period when it was perfectly uncertain whether alimony would be assigned her, or not. A good right of action, therefore, accrued to the plaintiff; and that cannot be defeated by any matter ex post facto. The alimony is, indeed, directed to be paid in respect of the period during which the plaintiff's right of action accrued; but the fact of the husband becoming bound, either by his own act, or by the order of a court of competent jurisdiction, to pay alimony from an antecedent period, cannot bar a claim. arising before he so became bound. There was no evidence to shew that the alimony was paid retrospectively; but if it was, the case is not varied: for the plaintiff could not prevent the wife's misapplying the money, and it was the duty of the husband to have seen that it was properly applied.

Tindal, contra. The case of Ozard v. Darnford (a), is a decisive authority in support of this rule. Lord Mansfield there laid it down as clear law, that where the husband and wife live separate, the person who gives credit to the wife is to be considered as standing in her place, inasmuch as the husband is bound to maintain her; and the spiritual Court, or a court of Equity, will compel him to grant her an

(a) Selwyn's N. P. 247, 3d Ed.

1826. Keegan v. Smith. adequate alimony. But if she elope from her husband, and live in adultery; or if, upon separation, the husband agrees to make her a sufficient allowance, and pays it; in either of those cases, the husband is not liable; because, in the former case, she forfeits all title to alimony; and, in the latter, has no further demands on her husband. Here, the wife, after separation, obtained a decree of the ecclesiastical Court for alimony, which was to be payable in respect of the period during which the plaintiff's claim accrued, and which, upon the evidence adduced, must be taken to have been actually paid. The wife herself, therefore, had no further claim upon the husband, and as her creditor, the plaintiff, stands in her place, it follows that he can have no claim against the husband. This action, therefore, is not maintainable.

ABBOTT, C. J.—At the time when the credit was given to the wife, it was matter of uncertainty whether a decree for any or what alimony would be obtained against the husband. In the interval of that uncertainty, was the wife to starve? Certainly not; the husband was bound to maintain her: and as he suffered her to live separate from him, he suffered her to carry a credit with her. The decree of the consistory Court, by which alimony was enforced. was made after the whole of the debt which the plaintiff claims by this action was incurred. The plaintiff, therefore, once had a complete right of action, and I am decidedly of opinion, that a claim so acquired cannot be taken away by any matter ex post facto, by an event which has happened subsequently to the time when that right of action accrued. I think the rule for entering a nonsuit ought to be discharged.

BAYLEY, J.—It is true that the creditor, to a certain degree, stands in the situation of the wife, and is to be considered as claiming through her; but if the husband does not himself supply the wife with necessaries, he

gives her a credit upon these who will supply her: and the law implies an authority from the husband to the wife; to contract for whatever is necessary for her subsistence. In this case, for all that appears, the wife was utterly destitute of any allowance from the husband, or of any means of obtaining the necessaries of life, during the whole of the period in the course of which the plaintiff's demand accrued: and therefore the law gave her an implied authority from the husband to contract the debt in question.

HOLBOYD, J., and LITTLEDALE, J., concurred.

Rule discharged (a).

Prince and another, v. Lewis.

The declaration stated that plaintiffs were possessed of a certain close, called Covent Garden market, situate, &c., and of a certain market holden and to be holden there on every day in the week throughout the year, Sundays and the feast-day of the birth of our Lord Christ excepted, for the buying and selling of all and all manner of fruits, flowers, vegetables, roots and herbs whatsoever, together with the tolls, stallage, &c., to such market appertaining, whereby divers great gains, &c., accraed, and still of right ought to accrue to plaintiffs; yet defendant knowing the premises, and intending to injure plaintiffs, on the 4th January, 1825, and on divers other days, being all other days than Sundays, &c., and being respectively, days on which the said market was held, at, &c., in a certain public highway there, near to the said purposes for market, and within 72 yards thereof, wrongfully, and without the license, and against the will of plaintiffs, ex- granted. posed to public sale, and sold to divers persons, divers large quantities. of vegetables; and the said persons who so

(a) Vide Jee v. Thurlow, ante, vol. iv. ii. 2 B. & C. 547. Lews v. Lee, ante, vol. v., 98. 3 B. & C. 291.

1826. KEEGAN 12. SMITH.

Wednesday 26th April.

The grantee of a market cannot maintain an action against an individual for selling goods without the market, and thereby defrauding him of the toll; without shewing that he has appropriated the whole of the market space, or, so much of it as the public convenience requires, to the which the market was

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Lewis,

bought the said vegetables, and who would otherwise have resorted to the said market, were induced to resort to the said highway, and there to buy the said vegetables so exposed to sale in the said highway, to the damage of plaintiffs, and to the injury of the said market; by means whereof plaintiffs were disturbed and annoyed in the exercise of the said market, and were deprived of divers large sums, which would have accrued to them; &c. Plea, the general issue, not guilty, and issue thereon. the trial, before Abbott, C. J., at the adjourned Middleser sittings after last Trinity term, the case was this:— The plaintiffs were the lessees of Covent Garden market, under the Duke of Bedford, to whose ancestor the market was granted by letters patent, in the reign of King Charles the second, "for the buying and selling of all and all kinds of fruits, flowers, vegetables, roots and herbs whatsoever, together with all liberties, free customs, tolls, stallage and piccage, and all other profits, advantages and emoluments whatsoever to the same market in any wise belonging or appertaining." This grant was recited in a private act of parliament, 53 Geo. 3, c. 71, entitled "An act for regulating Covent Garden Market," and which act provided that the accustomed toll should be payable by the seller of fruit, &c., in the market. The defendant occupied a house in James street, near the market, and on the 4th January, 1825, he placed a waggon loaded with vegetables, in front of his house, and within about 70 yards of the market, and there sold the vegetables. The accustomed toll was demanded of him, but he refused to pay it. There was, during some part of that day, sufficient room left in the market for him to have placed his waggon there; but that circumstance was never communicated to him, nor was he desired to place his waggon in the market. There were several persons who rented stands by the year in the area of the market, and there were also several shops there for the sale of earthenware, besides one or two public houses, and some other buildings not appropriated to the sale of fruits, &c. Upon this evidence the Lord Chief Justice was of opinion, that the plaintiffs could not maintain this action, inasmuch as the owner of a market was not entitled to any remedy against those who sold goods near it, unless he shewed that he had devoted the whole space of the market to the particular purposes for which the market was granted; which the plaintiffs in this case had not done. His Lordship, therefore, directed a nonsuit.

PRINCE

LEWIS.

Gurney, in Michaelmas term last, obtained a rule nisi for setting aside the nonsuit, and for a new trial; against which

Scarlett and Marryat, now shewed cause. This action can be maintained only upon the supposition that the defendant has illegally refused payment of the tolls claimed by the plaintiffs, and has thereby committed a fraud upon their rights, as lessees of the market. Now there is no ground for that supposition; therefore the nonsuit was right. made without the limits of the market, at a time when the market was already wholly occupied by persons selling goods within it, cannot possibly injure the plaintiffs; because so long as the market is full, they receive all the emolument which the grant of the franchise purported to If the lord of a market were to appropriate afford them. the whole of the space intended for the market to other and different purposes, he clearly would have no right to maintain an action against any person who sold goods without the market; and if he so misappropriates a part of the space intended for the market, and the remainder is fully occupied by persons selling goods within it, the result is the same, and he is equally unentitled to maintain an action against those who sell near to his market. Of right, the market should be open to all who chuse to frequent it; but here, it was in evidence, that particular individuals were allowed to expose their goods to sale in particular places: and that the space allotted for the open market was almost always full. If at the time when the defendant sold PRINCE v.
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his goods in James street, there was no room for him in the market, the plaintiffs have sustained no damage from him; and if there was, during some part of that day, room for the defendant in the market, still, before he can be charged with fraudulently refusing the payment of the toll, it should appear that he was informed of that fact.

Gurney, Denman, C. S., Brougham, and Hutchinson, contrà. Proof of a grant of a market to the plaintiffs, and of a sale of goods immediately out of it, without payment of toll, by the defendant, was sufficient to maintain this action. It was for the defendant to shew, that at the time of the sale, there was not room for him in the market; instead of which it clearly appeared that there was room for him, at least during part of the day. The fact of the plaintiffs having misappropriated part of the space intended for the market, is no answer to the action, if there was still room in the market for the defendant. The seller has the advantage of exposing his goods before the purchasers frequenting the market, and it is in respect of that advantage, that the lord claims his toll; and if the seller, instead of going into the market and paying toll, sells his goods near the market toll free, he has the same advantage himself, and defrauds the lord of his toll. If the area of a market is misappropriated, to the exclusion of those who would otherwise expose their goods to sale there, the lord is liable either to an action, or an indictment, or perhaps, to a forfeiture of his franchise; but it has been decided, that the lord of a market may lawfully erect and let out stalls in it, provided he leaves sufficient space for the market people to come in and sell their wares, Rex v. Burdett (a).

ABBOTT, C. J.—I thought at the trial, that before the lord of a market, or his lessee, could maintain an action complaining of a person who sells without the limits of the market, as doing him damage, it was incumbent on him

(e) 1 Ld. Raym. 148.

to shew, or at least that the contrary should not be shewn against him, that no part of the space of the market which ought to be open and free of access for general accommodation, is, with his assent, devoted to other purposes. I entertain the same opinion now. It may, perhaps, be true, upon a critical examination of the evidence, that during some part of the time when the defendant's waggon was standing in James street, there might be room for it within the limits of the market. But, admitting that to be so, it does not alter my opinion; because, if, according to the general and ordinary use which is made of this market, the public are deprived of the accommodation which, considering the space of the market, they ought to have, and if it generally happens that the space allotted to them is fully occupied; then, as the lord of the market, or his lessee, cannot complain of a person selling near the market when it is full, it is incumbent upon the lord, or his lessee, when the market is not fully occupied, to give notice to the person of whom he means to demand a toll, that there is room for him in the market. Not having done so in this case, I think he has no right to claim of a person selling out of the market, the same toll as if he had sold within the market. It is, however, said, that many of the erections in the market have existed from very ancient times. Probably that is so; because when the market was first established, it may be very easily conceived, that the space allotted for it was more than the public accommodation required: but by the great increase of population, and the consequent increase in the consumption of vegetables, that space has now become insufficient. Those erections, and those appropriations of the space allotted for the market, which in former times might be legitimate and reasonable, have now, therefore, become illegitimate and unreasonable, and before the lord of the market can complain of being defrauded of his toll by persons selling near it, he must remove all obstructions, and devote the whole of the space to the object for the furtherance of which the grant of a

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market upon that space was designed, namely, the accommodation of persons coming there for the sale of a particular species of commodity. Now, it appears in this case, that there are china shops and public houses erected upon the market. The public houses may be convenient to the persons resorting to the market; but they may be placed without the limits of the market, without rendering them useless or inconvenient; and if they are inconsistent with that appropriation of the space which the law contemplated for the benefit of the public, the lord must remove them: for if he wishes to maintain an action against any person for selling without and near the market, he must shew that there has not been such an appropriation of the space allotted for the market, as precludes that person from selling within the market. For these reasons, I still think that the nonsuit was right.

BAYLEY, J.—I also think that the nonsuit was right. Wherever there is the franchise of a market, the lord has certain rights; but he has also certain duties to perform towards the public in respect of those rights. I take one of those duties to be, that he shall, so far as the limits of the market will allow, take care that there is sufficient room for all the purposes of the market. Now this is a market created by charter, within specific limits, and for specific purposes. Generally speaking, if the space allotted for the market is more than is necessary for the purposes of the market in ordinary times, the lord is at liberty to appropriate the vacant space to other purposes; but whenever the necessities of the persons frequenting the market require that the whole of the space shall be dedicated to the use of the market, then, as it seems to me, there is an obligation on the part of the proprietor, so to dedicate it; and if he will not so dedicate it, and if at ordinary times there is not sufficient room for the purposes of the market, I think he cannot bring an action against a person who sells without the limits of the market, unless

he shews that he first apprised that person that there was, at the time of such sale, room for the purposes required within the market, to which he might resort. If the lord does communicate that to the party, then there may be an obligation upon him to go into the market; but he ought not to be under the necessity of attending de die in diem, to see whether there is or is not room. Now, in this case, the plaintiffs, instead of communicating to the defendant that there was room, merely demanded the toll of him. In my opinion, there was a fraud practised upon the market. but it was a fraud practised by the lessees of the market, and not by the defendant. One of the objects which the owner of a market is bound to attend to, is, that the nuisance which, as a necessary consequence, it produces, is confined to the limits of the market. But what is the case with respect to James street, and what is the situation of that street on the market days? The lessees treat it as part of the market; it is incumbered with carts, and commodities for sale, and the lessees are claiming toll from the persons selling there. So that the lessees would permit persons to sell out of the market, provided they will pay them toll; but would treat them as wrong doers if they withhold the toll. In my opinion, the nonsuit was right, because there was clear evidence that in general there was not sufficient room for the purposes of the market within the limits specified, and because there was no specific communication to the defendant at the time he was selling in James street, that there was room for him to have placed his goods within the limits of the market.

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LITTLEDALE, J. (a).—I also am of opinion that this nonsuit was right. The Duke of *Bedford* is owner of the soil, and he has a grant from the crown to hold a market, which grant is confirmed by act of parliament. A grantee under such circumstances, is not bound to extend the mar-

<sup>(</sup>s) HOLBOYD, J., was not present during the argument, and therefore declined giving any opinion.

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ket over the whole of the soil; it is enough if he appropriates so much of it as is sufficient for the purposes of the market; and he may shift and change the market to different parts of the space specified in the grant. was decided in the case of Curwin v. Salkeld (a). fore, the Duke of Bedford, as the owner of this franchise, was not bound to appropriate the whole of the space specified in the grant to the purposes of the market, unless it was actually necessary; but before he, or his lessee, could bring an action for a disturbance of his franchise, as in this instance, he was bound to shew that he had left sufficient room for the purposes for which the franchise was granted to him. Now, here, it appears that there is not room at all times of the year for the persons resorting to this mar-In consequence of this, many persons sell out of the market; and of those persons the defendant is one. I concur in the argument used on the part of the plaintiffs, that, generally speaking, in an action like the present, it lies on the defendant to shew, that there is not room for him within the market; for when the plaintiffs have once established their right, and it appears that the defendant sells things which are the subject of sale in the market, so near, that it would be prima facie, a fraud upon the owner of the market, it lies upon the defendant to rebut by evidence the case so established. But here it was shewn, that part of the space allotted for the market was appropriated to other purposes, for it appeared, that there were public houses, china shops, and an old iron shop erected within the market. Now the lord had no right to erect such buildings upon a market, specifically appropriated to the sale of vegetables, fruits, and flowers. The lord of a market has the direction of the market; he may direct the vegetables to be sold in one place; the fruits in another, and the flowers in a third: so he may say that carts shall be brought to one place, and baskets to another, by virtue of his general power of management and direction,

(a) 3 East, 538.

but whenever the public convenience requires it, he is bound to devote the whole space to the purposes of the There have been many instances of actions like the present brought against individuals who have sold their goods so as to defraud the lord of, a market; but in all those cases it appeared, that there was sufficient room for those individuals to go into the market, if they thought fit: and I infer from thence, that it is the duty of the lord of a market, always to set out sufficient room for the persons resorting to the market. If this action could be supported, the Duke of Bedford, or his lessees, would gain much more by this market than he or they have any right to do. They have now the full profit of the market, for they have the benefit of the toll upon all the goods sold there; but by this action they seek to establish a right to toll upon goods sold in James street, which is without the limits of the market; by which means they would gain a much larger profit than they are entitled to under the grant. It has been urged, that on the day in question, there was sufficient room for the defendant to have placed his waggon within the market; but it was proved, that during a considerable portion of the year, the market was so occupied, that it was impossible for him to get into it. I think he is not bound to be upon the watch, day by day, and hour by hour, to find a spot where his waggon may stand. As it was proved that the market was in general fully occupied, I think it lay upon the plaintiffs to shew, that on the day in question, the defendant knew that there was room for his waggon in the market.

Rule discharged.

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Friday, 28th April.

Shipton and another v. B. Casson.

A., a credi-tor of B., agrees to receive his debt by instalments, of which C. guarantees the payment. B., at the same time, contracts to sell to A. a quantity of bark, and delivers a part, which A. never returns, and then fails in his contract. One day after the first instalment becomes due, C. remits the amount. less the price of the bark delivered, to A., partly in bills, and partly in bank notes; the receipt of which A. acknowledges, and promises to carry to the credit of B.'s account. In an action by A., against B., for the amount of the first instalment :---Held, first, that B. was entitled to setoff the value of the bark delivered against A.'s demand; and second, that,

ASSUMPSIT. The declaration was of Easter term, 5 Geo. 4, and contained the common counts for work and labour, with the money counts. The defendant pleaded the general issue, non assumpsit, with a set-off for goods sold and delivered, money lent, money paid, &c. At the trial before Abbott, C. J., at the London adjourned sittings after Hilary term, 1825, the plaintiffs obtained a verdict, damages 466l. 19s. 3d., subject to the opinion of this Court upon the following case.

On the 26th November, 1823, the defendant was indebted to the plaintiffs in the sum of 7071. 13s. 3d. On the same day the plaintiffs, and Henry Casson, the defendant's father, and the several other persons whose names appear to be subscribed, signed a memorandum of agreement, of which the following is a copy:—

"Whereas, Benjamin Casson, of Sculcoates, tanner, stands indebted to us, whose names are hereunto subscribed, in the several sums written opposite our respective names, which he being unable at present to satisfy, hath requested us to grant him time for payment in manner herein written, to which, in consideration and on condition of his father, Henry Casson, of Sutton, yeoman, agreeing to guarantee the full payment thereof, we respectively consent, and hereby do, and each of us doth grant and allow unto the said B. Casson, time for payment thereof, in manner following; and hereby promise and agree that we will not sue, implead, prosecute, or otherwise molest or harm the said B. Casson, his executors or assigns, for or on account of our respective debts, or sums owing to us, unless or until some default be made by him or them, of or in the payment of the said respective sums, at the times hereby agreed to, that is to say, at four

though A. was not bound to accept the remittance, yet, having accepted it, he had waived all objection to it, and could not maintain the action. months from the date hereof, payment at the rate of seven shillings in the pound; at eight months from the date hereof, other seven shillings in the pound; and at twelve months from the date hereof, the remaining six shillings in the pound."

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On the 27th March, 1824, H. Casson sent to the plaintiff a letter, as follows: -- "Inclosed are three bills, a bankpost bill, and a bank note, value together, 2421. 10s. 6d.; please credit my son's account for the amount, and acknowledge the receipt in course of post." The plaintiffs received the said letter and remittances, and on the 29th March, they wrote the following letter in answer:--"Your's of the 27th is received this day, inclosing bills and notes, value 2421. 10s. 6d., which will pass to your son's account when paid." The defendant proved, by way of set-off, the delivery of bark to the plaintiffs, to the amount of 231. 4s., on the morning of the 26th November, 1823. In answer to which, the plaintiffs proved that such bark was part of a quantity bargained by the defendant to be delivered to the plaintiffs, by the following contract: -" Sold T. Shipton and Son, the whole of the bark laid in B. Boyes' warehouse, for five shillings per ton on the invoice price, to be transferred to his account, and after this, the 26th November, at their risk and expense; the quantity, about 57 tons 17 owt., B. Casson paying for all expenses of delivery." The invoice price of this bark was 101. per ton. Barges were hired by the plaintiffs to take away the bark, and one lay for some days waiting for the bark, and then went away, the defendant having failed to deliver the residue of the quantity stipulated, according to his contract, within a reasonable time after his contract. It appeared, that Mr. Boyes, in whose possession the bark was, stopped the delivery of the residue to the plaintiffs. and they only obtained two tons and upwards, to the value of 231. 4s., in part of the entire quantity. The first instalment of seven shillings in the pound on the said debt of 7071. 13s. 3d., due from the defendant to the plaintiffs,

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amounts to 247l. 13s. 7d., being 5l. 3s. 1d. more than the sum remitted. If the 23l. 4s. for the bark delivered to the plaintiffs, is to be deducted and allowed to the defendant, from the sum of 707l. 13s. 3d., then seven shillings in the pound on the residue will leave the remittance made by H. Casson, 2l. 19s. 3d. more than the first instalment would amount to. The action was commenced before the second instalment was due.

Chitty, for the plaintiffs. The first instalment from the son was due on the 26th of November; the remittance made by the father was not sent till the 27th, and did not come to hand till the 29th: consequently it came too late. All argeements for the payment of debts by instalments must be construed strictly; they must be performed to the letter: the slightest deviation will vacate them, both at law and in equity. In Leigh v. Barry (a), the Lord Chancellor refused to relieve, in consequence of default in payment of the composition on the very day; and the creditor was allowed his remedy at law for the whole debt; and in Chanley v. Hillary (b), where a composition was to be paid in bills, it was held by this Court that it was the duty of the debtor to tender the bills to the creditor on the very day, and that it was not sufficient for him to have them in readiness to deliver to the creditor, on request. besides being irregular in point of time, the remittance was insufficient in two other respects, namely, its nature, and its amount; for, in the first place it consisted partly of bills, whereas it should have been all in cash, and in the second, it was deficient in amount to the value of the bark delivered to the plaintiffs, which the defendant had no right to set off against the plaintiffs' demand, at leastin that account: because, as he was bound by the agreement to pay a particular sum on a particular day, it was not competent to him to reduce that sum by setting up a cross demand. Moreover, the set-off could not be

<sup>(</sup>a) 3 Atk. 583. 1 Vern. 210.

<sup>(</sup>b) 2 M. & S. 120.

maintained under any circumstances. The contract for the bark was entire, and had been only in part performed by the defendant; consequently he had no claim for the price of the part delivered, either by way of action or set-off: for the contract being entire, he acquired no right until after full performance of it on his part, Waddington v. Oliver (a), Walker v. Dixon (b).

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Parke, contrà, was stopped by the Court.

ABBOTT, C. J.—I think the plaintiffs are not entitled The first question is, whether the remittance made in payment of the first instalment was sufficient; or, in other words, whether the plaintiffs were bound to pay the fair value of the bark which they accepted and kept, or were entitled so to accept and keep it without paying for it at all. I admit that where a contract is made for the purchase of a large quantity of goods, and a part only of that quantity is delivered, the purchaser is not bound to pay for that part, until the period fixed for the delivery of the whole has arrived; because, if the seller should ultimately fail to deliver the whole, the contract is at an end, and the purchaser is at liberty to return the part delivered. But where the purchaser elects to keep the part delivered, he keeps the contract alive, and must pay the value of what he so accepts; and that value, in cases of contracts for the sale of goods, can always be ascertained without difficulty. Then, if the purchaser is bound to pay the sum so ascertained, the seller is entitled to set off that sum against any demand upon him. In cases of contracts not divisible, such a set off-may be attended with difficulties, because the amount of it cannot easily be ascertained; as, for instance, in a contract for building a house, where part only of the work is performed, it would be difficult to estimate the value of the work done, from the value of that which remains to be done: but this being a

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contract for the sale of goods, and divisible, no such difficulty occurs. The second question is, whether the remittance was made in due time, and was of a proper nature. In point of time, undoubtedly, it was one day too late, and it consisted partly of bills, whereas, strictly speaking, it ought to have been all in cash; I agree, therefore, that the plaintiffs were not bound to accept it, that they might have returned it to the defendant, and have resorted to their right of action. But they did in fact accept the remittance, and treat it as cash, available to their own purposes, and to be placed to the credit of the defendant's account; and having so done, they are concluded by their own act, and cannot now be heard to make objections to the remittance, which they might have made, but elected to waive, at the time when that remittance was made.

BAYLEY J.—I am of opinion that the remittance was sufficient in point of amount, and that the other objections to it, as to the time when it was sent, and the materials of which it was made up, were waived by the plaintiffs at the time, and cannot be relied on now. Where there is an entire contract for the delivery of goods, which has been performed in part, and which may be performed as to the residue, no action will lie for the price of the part delivered, until the period for the delivery of the whole has arrived. But where some of the goods are delivered, which the purchaser, upon the seller making default in the delivery of the residue, does not return, but keeps, the seller may maintain an action, not for the contractprice, but for the actual value of those goods; and the purchaser's remedy is a cross action for the breach of contract. So, here, the value of the bark delivered may be considered as a fair item of set-off, at the time when the instalment became due, though it could not be so at the time when the delivery was made. The set-off, therefore, being good, and the remittance, for that reason, sufficient

in amount, how do the other objections to it stand? They were originally good; but they have been waived by the plaintiffs. When the bills arrived, the plaintiffs undertook to carry them to the credit of the son's account; but the father sent them in payment of the instalment then due, and the plaintiffs were bound, either to accept them with the specific appropriation, or to decline accepting them at all. Having so accepted them, they are bound by that acceptance, and cannot now be allowed to object, either that the remittance came too late, or that it was not of a nature to satisfy the agreement.

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The other Judges concurred.

Judgment for the defendant.

## WILSON v. GEORGE.

THE defendant had been served with a non-bailable latitat, returnable the 9th of February, which was the last general return-day in Hilary term. On that day he was served with a notice that a declaration had been filed de bene esse, requiring him to plead within eight days, which he neglected to do, and thereupon the plaintiff signed judgment as for want of a plea. Hilary term ended on general return of the term. the 13th February; the 12th, which was the last day, having fallen on a Sunday. A rule nisi having been obtained for setting aside the judgment for irregularity, on the ground that the plaintiff had no right by the practice of the Court to file a declaration de bene esse, upon non-bailable process on the last general return of the term;

Coltman now shewed cause against the rule, and contended that the proceedings were regular. By the rule of Court. Trin., 22 Geo. 3, A. D. 1782, it is ordered, "that upon

Friday, 28th April.

By the practice of this Court, a plaintiff cannot declare de bene esse upon nonbailable process returnable the last

WIESON v. GEORGE. all process to be issued out of this Court returnable before the last return of any term, where no affidavit shall be made and filed of the cause of action, the plaintiff may file or deliver his declaration de bene esse at the return of such process, with notice to plead in eight days after the filing or delivery thereof; and if the defendant doth not file common bail, and plead within the said eight days, the plaintiff having filed common bail for such debt, may sign judgment for want of a plea; and upon all such process, where an affidavit is made and filed of the cause of action. the declaration may be filed or delivered de bene esse at the return of such process, with notice to plead in four days after the filing or delivery, if the action be laid in London or Middleser, and the defendant live within twenty miles of London; and in eight days if the action be laid in any other county, or the defendant live above twenty miles from London; provided the declaration in either case be filed or delivered, and notice thereof given four days exclusive, before the end of the term, and a rule to plead be duly entered." The question then is, what is the last return of the term, within the meaning of Now the last day of the term, is the last regular return-day for latitats. The rule in question must be construed to apply to bailable and not non-bailable writs. This case is distinguishable from Key v. Brown (a), because there the defendant was arrested on a special capias. Here the process is non-bailable, and being returnable on the 9th, which was before the last return for latitats, the rule of Court was complied with, inasmuch as the defendant received notice of the filing of the declaration, four days exclusive before the end of the term.

C. Cresswell, contrà, was stopped by the Court.

ABBOTT, C. J.—Looking at the terms of the rule of Court, by which I think we ought to abide, it is quite obvious that the last return of the term, means the last general

(a) Ante, vol. iii., 28. 1 B. & C. 653.

The rule certainly will not bear the construction attempted to be put upon it, that the last day of the term is to be considered as the last day of return for writs of latitat. The spirit of the rule is, that the plaintiff should be in the same condition when the defendant did not appear, as when he did. If the defendant had appeared on the return day of the writ, the plaintiff might have declared against him, and have had a plea of the term. The intention, therefore, of this rule was, that the plaintiff should be allowed to file his declaration de bene esse, and not suffer from the default of the defendant's not appearing on the day of the return of the writ; and having reference to the terms of this rule, there seems no doubt, that the last return means the last general return, and not the last day of the term.

1826. Wilson v. GEORGE.

BAYLEY, J.—The object of this rule was, to enlarge the privilege of declaring de bene esse, upon writs returnable on the first and second returns, which had been given by a former rule. Mich., 10 Geo. 3. This rule extends the privilege to process returnable before the last return, but the last return clearly means the last general return.

The other Judges concurred.

Rule absolute.

The KING v. The Sheriff of MIDDLESEX, in WATER-HOUSE v. EAMES.

Friday. 28th April.

THE time for putting in and justifying bail in this case expired on the 7th February. On that day one of the fying bail ex-

Where the time for justipired on the

7th, and time was given till the 9th February, to add and justify other bail, and on that day the defendant was rendered in brishall, and notice thereof was given on the same day to the plaintiff:—Held, that the sheriff was liable to be attached on the 10th, if the plaintiff had lost a trial for the sittings after term.

A regular attachment against the sheriff shall not stand as a security, unless the plaintiff has lost a trial within the term, nor where the defendant has been rendered before

the last day of term.

The KING

o.
The SHERIFF

of
MIDDLESEX.

bail justified, and time was given until Thursday the 9th, to add and justify another bail. On the 9th, the defendant was rendered in discharge of his bail, and notice thereof was duly served upon the plaintiff's attorney on the same day, and next day the plaintiff obtained an attachment against the sheriff for not bringing in the body. A rule nisi having been granted for setting aside the attachment for irregularity, with costs,

Gurney and Andrews now shewed cause, and contended that the attachment was regular, inasmuch as the bail had not justified on the 9th February. The effect of giving time to add and justify another bail, was to delay the plaintiff, and he ought not to be prejudiced by giving such time, inasmuch as the condition in such cases is, that the plaintiff shall be in the same condition as he ought to be by the course and practice of the Court, had the bail justified in time. Now had the bail justified on the 7th, the plaintiff would have been enabled to go to trial at the sittings after term; but by giving time, he would be thrown over to the adjourned sittings. This case, therefore, is distinguishable from those where an attachment, moved for after notice of render, has been held irregular. The question, as to the regularity or irregularity of the attachment, depends upon whether the plaintiff has, or has not, lost a trial.

Campbell, contrà. This attachment is clearly irregular. It is true, that on Thursday, the 9th February, the plaintiff might have moved for an attachment (a), the bail not having justified on that day; but having let his opportunity slip, he was not at liberty to attach the sheriff on the following day. Here the defendant was rendered on the 9th, and notice thereof was duly served upon the plaintiff, and no instance is to be found in which the Court has permitted an attachment to go against a

sheriff under such circumstances. In Rex v. The Sheriff of Middlesex (a), it was held, that an attachment against a sheriff for not bringing in the body after the defendant has surrendered, is irregular, though the surrender be not made until after the rule for bringing in the body has expired. So in Thorold v. Fisher (b), it was held, that though the rule for bringing in the body has expired, yet if the defendant justifies his bail before the plaintiff moves for an attachment, the sheriff is not liable to the attachment. The plaintiff, therefore, having in this instance let slip his opportunity of attaching the sheriff on the 9th, the subsequent render of the defendant on that day, purged the sheriff's contempt.

ABBOTT, C. J.—I think this case is distinguishable from those which have been cited, and many others that have occurred, in which it has been held, that the motion for an attachment after notice of a surrender of the de-In such cases, the attachment fendant, is irregular. against the sheriff can have no other effect than to bring the party before the Court to set it aside, which he may do for asking for, on payment of costs, thereby, however, increasing expense to the party, which the Court is by no means disposed to encourage. In this case, however, there is something more than usually occurs in the instances alluded to, for here, the plaintiff has not merely the right to insist that the defendant shall justify bail, or render within time, but that he shall be placed in such a situation as to be enabled to give notice of trial for the sittings after term. If the bail here had justified on the 9th, the defendant would have been obliged to accept notice of trial for the sittings after term, the plaintiff being entitled to be put in the same situation which he would have been in on the 7th; but the defendant not having justified his bail on the 9th, and being then under no obligation of accepting notice of trial for the sittings after term, we think

(a) 2 M. & S. 562.

(b) 1 H. B. 9.

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1826. The King 10. The Sheriff of MIDDLESEX. the plaintiff had a right to move for an attachment. are, therefore, of opinion, that this attachment was not irregular, and that it can only be set aside on the terms of paying costs, and the attachment standing as a security.

Campbell, submitted that the attachment ought not to stand as a security, inasmuch as the plaintiff had not lost a trial within the term.

The Court conferred with the Master how this was, and

The Master certified the practice to be, that the plaintiff was not entitled to have the attachment stand as a security if the defendant rendered before the plaintiff could go to trial; and that the test in such cases was, whether the plaintiff had lost a trial which might be had at a sitting within term.

The Court, said, that according to the practice so certified, the attachment ought not to stand as a security; and under the circumstances, they ordered the attachment to be set aside without costs.

Rule absolute (a).

(a) See 1 Chit. 270-357.

Saturday, 29th April.

The words; " *H*.'s oath ought not to be taken, for he has been a forsworn man, and I can bring people to prove it; and they that

#### HALL v. WEEDON.

CASE for words. The words set out and proved were these: "Mr. Hall's oath ought not to be taken, for he has been a forsworn man, and I can bring people to prove it; and they that know him, will not sit in the jury box with him." The declaration contained no colloquium, or inuendo, shewing that the words related to the previous

knew him, will not sit in the jury box with him;" are not actionable, per se.

conduct of the plaintiff as a juryman, or in any judicial proceeding; and there was no special damage proved. Plea, not guilty, and issue thereon. The plaintiff obtained a verdict. A rule nisi having been obtained for arresting the judgment, on the ground that the words were not actionable in themselves, and that the declaration contained no averment shewing that they related to the plaintiff's conduct as a juror, or in any judicial proceeding, so as to render them actionable:

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F. Pollock, now shewed cause. It must be admitted that this declaration cannot be sustained, unless the words set out are actionable in themselves; but it is contended that they clearly are so. The word "forsworn," taken in connection with the succeeding words respecting "the jury box," clearly means that the plaintiff has committed perjury in his character of a juryman. In that respect this case differs from that of Holt v. Scholefield (a), which will be relied on for the defendant. There the words were, "Holt has forsworn himself, and I have three evidences to prove it;" which, standing alone, did not point to any particular conduct of the plaintiff, from which it could be inferred that they alluded to an oath taken by him in any judicial proceeding: but here the reference of the words to an oath taken by the plaintiff in the character of a juryman, is clear. In Carn v. Osgood (b), the words were, "he is a forsworn justice, and not fit to sit upon the bench;" and though there was no colloquium, the Court held the words to be actionable, inasmuch as they clearly referred to the conduct of the plaintiff in his office of a magistrate. In Rolle's Abridgment(c), it is said, the words, "Thou art a perjured fellow, for thou wast forsworn before the Lord Bishop of Norwich," are not actionable; but the reason there given is satisfactory, and distinguishes that case from the present. There, the

<sup>(</sup>a) 6 T. R. 691.

<sup>(</sup>c) 1 Rol. Abr. Action on the

<sup>(</sup>b) 1 Levinz. 280.

Case, (Y) 41.

HALL v. WEEDON. defendant begins by making a charge of perjury, but goes on to add words of reference and explanation, which either entirely refute the charge, or at least render it equivocal; because they do not allege that the forswearing took place in the court of the bishop, or in the course of any judicial proceeding: here the subsequent words, are at once explanatory and confirmatory of the original charge, for it is impossible to doubt that they mean, that the plaintiff had perjured himself while serving as a juryman.

Gurney, contrà, was stopped by the Court.

ABBOTT, C. J.—The words declared upon in this case are sufficiently reproachful; but unexplained as they are, I am of opinion that they are not in themselves actionable. Taking them by themselves, I cannot clearly and of necessity understand that they refer to the plaintiff's conduct, as a juryman, or in any judicial matter. Indeed, it might well be, that the assertion that those who knew the plaintiff would not sit in the jury box with him, was made as the consequence of his misconduct out of the jury box, and in some matter not judicial. The judgment, therefore, must be arrested.

The other Judges concurred.

Rule absolute.

Saturday, 29th April.

### BLACKETT v. WEIR.

In assumpsit for goods sold, a person who on the yoir dire admits his joint liability with ASSUMPSIT for goods sold and delivered. Plea, non assumpsit, and issue thereon. At the trial, before Bayley, J., at the Northumberland summer assizes, 1825, the case was this:—The action was brought to recover the value of

the defendant, is a competent witness for the plaintiff.

a quantity of coals, sold by the plaintiff to a steam packet company, of which the defendant was alleged to be a member. In order to shew that the defendant was one of the company, a witness named Gilson was called, who, upon being questioned on the voir dire, admitted, that he was himself one of them. The defendant's counsel thereupon objected to the witness as incompetent; contending, that he had a direct interest in the event of the suit. The learned Judge overruled the objection, and admitted the witness; and the plaintiff obtained a verdict, with liberty for the defendant to move to enter a nonsuit.

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F. Pollock, in Michaelmas term last, moved accordingly, and obtained a rule nisi. He cited Bland v. Ansley (a), Brown v. Brown (b), and Mant v. Mainwaring (c).

Scarlett, now shewed cause. Gilson was clearly a competent witness, on the part of the plaintiff. It is said, he was interested in the event of the suit, and therefore not competent; but that argument is founded upon a misapplication of the rule of law, which really applies to those cases only where the interest which the witness has, is an interest in favour of the evidence which he is called upon In this case, the interest was entirely the other way, for Gilson's admission, that he was one of the company, of which there was no other evidence, rendered him He, therefore, came to speak liable to contribution. against his own interest; and at least he could have no interest in obtaining a verdict in favour of the plaintiff. If Gilson could be considered as a party to the record, he certainly would not be admissible as a witness; Bauerman v. Radenius (d); but it is impossible to contend that he is, either actually, or virtually, any party to the record. will perhaps be contended, that Gilson was interested in

<sup>(</sup>a) 2 N. R. 331.

<sup>(</sup>c) 2 J. B. Moo. 9. 8 Taunt. 139.

<sup>(</sup>b) 4 Taunt. 752.

<sup>(</sup>d) 7 T. R. 663.

BLACKETT v. WEIR. making as many persons as possible appear to be partners in the concern, because by so doing, he would reduce his own share of contribution; but his own admission was the only evidence of his being liable to contribution at all, and his interest would clearly have been to conceal, instead of proving that fact. [Littledale, J. There is a recent case of Cosham v. Goldney and another (a), which seems to me to be in point in your favour].

F. Pollock, contrà. The case last cited is an authority in favour of the defendant, because it shews that a person alleged to be a partner, is a competent witness to disprove that fact, and to prove the exclusive liability of the defendant; it follows, therefore, that such a person cannot be competent to prove the converse, namely, that he is a partner, and that he and the defendant are jointly liable. Gilson's admission that he was a partner, rendered him, prima facie, liable to the whole of the plaintiff's demand; he had, therefore, a decided interest in procuring a verdict against the defendant, and thereby shifting the liability, either wholly, or in part, from himself, and fixing it upon the defendant. The effect of his evidence is to procure payment by another of his own debt; and a more direct interest in the event of a suit can scarcely be imagined. Lockart v. Graham (b), and York v. Blott (c), appear at first sight to be authorities in favour of the plaintiff; but they are both distinguishable from the present case. The short, but important, distinction is this: -- Where the existence of two joint contractors is admitted, as in those cases. one of them may be examined as a witness to prove the identity of both; but here the existence of the joint contractor was not admitted, and Gilson was examined as a witness to prove that fact.

ABBOTT, C. J.—I am of opinion that the testimony of Gilson was admissible on the part of the plaintiff in this

<sup>(</sup>a) 2 Stark. 414.

<sup>(</sup>b) 1 Str. 35.

<sup>(</sup>c) 5 M. & S. 71.

case. The cases cited when this rule was obtained, go to shew, that where one joint contractor has suffered judgment by default, he cannot be examined as a witness. admit the truth of that position: it is founded upon the general rule of law, that a party to the record cannot be examined. It is quite clear that Gilson was not a party to this record; but it is said, that he had an interest. Undoubtedly he had so; but it was an interest against the plaintiff, and not in his favour; for in the event of the plaintiff's recovering a verdict, the defendant would have a claim upon Gilson for contribution. In actions of trespass, witnesses, apparently liable to a much stronger objection, are constantly admitted. The recovery of a verdict in that action against one of several co-trespassers, is a bar to an action against the others; yet nothing can be more familiar to the experience of us all, than a person who has committed a trespass, being examined as a witness to prove that he acted under the command and authority of the defendant. If a joint trespasser may be a competent witness, surely a joint contractor may be; and indeed à fortiori would be: for in the former case, as there is no contribution in actions of tort, a verdict for the plaintiff would relieve the witness from liability, whereas in the latter, as there is contribution, such a verdict would impose a liability upon him.

BAYLEY, J.—It seems to me that Gilson was a competent witness. In one point of view, he had an interest in obtaining a verdict for the defendant; for, by admitting his own liability, he rendered himself liable to a proportion of the costs, as well as of the debt, in the event of the plaintiff obtaining a verdict. The only difficulty that has occurred to me, arises from the circumstance of his proving a partnership between himself and the defendant; but his proving that fact in the present action, would not be evidence of it in any other; and if the present defendant can hereafter shew that no such partnership in fact existed, he

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may, probably in a court of Law, but certainly in a court of Equity, recover from the witness the full amount of his liablity in this action.

HOLROYD, J.—I am of the same opinion. The effect of Gilson's evidence would be to render himself liable in a future action. It has been urged, that he is interested to fix the defendant with a part of the debt, because otherwise he would himself be liable for the whole: but if he was originally liable for the whole, I think he still continues so: and that the present defendant, upon proof of that fact, might recover against him, in an action at law, for money paid to his use, the full amount of the verdict in this action. That is the principle upon which all actions of contribution are founded, and in that view of the case, the witness was clearly speaking against his own interest, and not for it.

LITTLEDALE, J.—If the plaintiff recovers, the defendant will have contribution from the witness: and if he fails, he may recover from the witness, and the witness will have contribution from the defendant. It is said, that in that case he might not be able to prove the partnership between himself and the defendant; but as the only evidence of his own liability is his own admission, the whole of his testimony must be taken together: and then the joint liability of the defendant is made out. I think the witness was competent, and that the rule ought to be discharged.

Rule discharged.

The King v. The Justices of Warwickshire.

THIS was a rule nisi for a mandamus to the justices of the county of Warwick, commanding them to allow, out of the county rates, certain fees claimed by one of the coroners of the said county, for holding inquisitions within his district, under the following circumstances: The coroner claimed to be allowed in his account, a fee of 20s. for every inquest to 9d. per mile held, and for his travelling expenses from his own residence at W. to B., where he held three different inquisitions. at the rate of 9d. per mile, upon each and every inquisition, as if he had performed three several journies; and the journies. question was, whether he was entitled so to be paid out of the county rates, or had only a right to the expenses of one journey.

Copley, A. G., and Holbech, now shewed cause against the rule, and contended, upon the language of the statute 22 Geo. 2, c. 29, s. 1, that the coroner had no right to charge more than 9d. per mile for travelling expenses, in going from his own place of residence, on the same day, to one place, and there holding two or more inquisitions. By that statute it is enacted, "that the sum of 20s. shall be paid to the coroner for every inquisition taken upon the view of a body not dying in a gaol or prison, and for every mile which he shall be compelled to travel, from the usual place of his abode, to take such inquisition, the further sum of 9d., over and above the said sum of 20s. Now it would be a most unreasonable construction of this act, to hold, that the coroner shall be entitled to charge for his travelling expenses three times over, where he performs only one journey, to hold three or more inquisitions, on the same day, and at the same place.

Scarlett, contrà, urged, that as the coroner would have been compelled to travel the same journey three times over,

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A coroner going *one* journey on the same day, to hold three inquisitions at the same place, is not entitled out of the county rates for his travelling expenses, as upon three

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to hold the three inquisitions, if they happened not to be held on the same day, it was not an unreasonable interpretation of the statute, to hold, that he was entitled to charge for travelling expenses at the same rate as if he had performed three distinct journeys. Coroners were extremely ill-paid for their trouble and loss of time in the discharge of their duties, and therefore, a liberal interpretation ought to be put upon the statute. If an attorney happens to have three or more causes to conduct at an assize town, he is allowed, on the taxation of costs, the expenses of his journey in each, although he has, in fact, incurred the expense of only one journey, and the reason of this is, on account of the inadequacy of the remuneration for his services, if he were limited to the bare expenses out of pocket, in performing only one journey.

ABBOTT, C. J.—It appears to me that the words of this act of parliament are too strong to be got over. The statute says, that the coroner shall only be allowed for every mile, which he shall be compelled to travel, from the usual place of his abode, to take the inquisition, the sum of 9d., over and above the sum of 20s. Now here the coroner travels from W. to B. on the same day, and he there holds three inquisitions, and the question is, whether he is entitled to charge 9d. per mile, for travelling expenses, upon each of these inquisitions, or whether he is entitled only to 9d. per mile for one journey? It is clear he has taken but one journey to the same place, for the purpose of holding one of the inquisitions. Then as to the others, he makes no journey at all, because they are held at the same place, and on the same day. It seems to us, therefore, that it cannot be said that he was compelled to travel to the same place, for the purpose of holding the second and third inquisitions, and consequently, he is not entitled to more than the expenses of one journey.

HOLROYD, J. (a).—I think the words of the act of par-(a) BAYLEY, J., was in the Bail Court.

liament are too clear to admit of doubt. The coroner has been compelled to travel only one journey, and if so, then as the inquisitions were held on the same day, and at the same place, he is not entitled to charge upon them as if The JUSTICES he had gone a separate and distinct journey for each.

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LITTLEDALE, J., concurred.

'Rule discharged.

The King v. the Sheriff of Middlesex in Fenning v. Hollyoak.

On shewing cause against a rule, for setting aside for irregularity, an attachment against the sheriff for not bringing in the body,

· Abraham shewed for cause, in the first instance, that the affidavit upon which the rule nisi had been obtained, was entitled only " The King v. The Sheriff of Middlesex," instead of going on to name the original cause in which the attachment had issued.

ABBOTT, C. J.—It is very convenient that the affidavit to set aside the attachment should contain the name of the original cause in the title, but I have great difficulty in ficient; it must saying that it is absolutely necessary; for, I have no doubt that an indictment for perjury might well lie upon an affidavit entitled, "The King v. The Sheriff of Middlesex," without naming the cause. It seems to me, therefore, that although it may be convenient to name the cause, yet the defendmay give notice of justification of bail put in by the sheriff, provided the exception

has been properly entered.

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An affidavit in support of a motion for setting aside an attachment against the sheriff, may be entitled, "The King v. The Sheriff of Mid-dlesex," without naming the cause in which the attachment has been obtained.

Parol notice of exception to bail is not sufbe written, and also entered, in the filazer's book, before the sheriff can be attached.

It seems that ant's attorney

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the objection ought not to prevail, unless there is some general rule of Court upon the subject.

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F. Kelly, in support of the rule for setting aside the attachment, stated, as the ground of irregularity, that the defendant having put in bail to the action, the plaintiff's attorney gave the defendant's attorney a parol notice only of exception, and had not entered it in the bail-book at the filazer's office'; and therefore he submitted, that although the bail did not in fact justify, yet the sheriff could not be attached for want of a proper entry of exception to the bail; and he cited Cohn v. Davis (a), where it was held, that although an exception to bail has been regularly entered, and the defendant's attorney having had verbal notice of it, proceeds by giving notice of justification, and attempting to justify, yet notice in writing of such exception must have been given, to make the sheriff liable to an attachment for not bringing in the body.

Abraham, contrà, contended, that there was nothing in this objection, and that it was not incumbent on the plaintiff's attorney to enter the exception in the filazer's book. It was sufficient to give a verbal notice of exception; and at all events, as the defendant's attorney had given notice of justification, that was a waiver of the irregularity.

ABBOTT, C. J.—I think not, where you want to fix the sheriff.

BAYLEY, J.—In order to fix the sheriff, there ought to be a written notice of exception to the bail, and that exception ought to be entered in the bail-book. There may be a notice of justification given by the defendant's attorney on the part of the sheriff (as the Master reports); and that would be sufficient, where the exception to the bail is properly entered: but here, in order to attach the sheriff, you must shew that the notice of exception has been properly given and regularly entered. The sheriff has nothing to do but to look to the bail-book; and if he sees that there is an exception entered, he will take the proper steps to prevent an attachment: but in this instance, the bailbook gives him no information, and therefore, as against him, the notice of justification is no waiver of the irregularity of which complaint has been made. It appears to me, therefore, that the rule for setting aside the attachment must be made absolute.

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The other Judges concurred.

Rule absolute.

#### HALDEN v. GLASSCOCK.

BY an order of the Lord Chief Justice, this cause was referred to an arbitrator. The order was expressed to be made "upon hearing the attornies on both sides, and by their consent, so as the arbitrator should make his award his award, on or before the first day of the then ensuing term, or such should shew other time as the arbitrator by indorsement upon that it that the time order should direct." Before the time limited by this order had expired, the Lord Chief Justice made another fendant's conorder in the following terms:- "I do order that the time for the arbitrator to make his award in this matter shall be be attached enlarged until the 21st day of June." Before the 21st forming the June had arrived, his Lordship made a third order, in similar terms, by which the time was further enlarged until defendant's the 1st of July. On the 22d June, the arbitrator made his award, by which he directed the defendant to pay to from other cirthe plaintiff the sum of 1451., which sum was demanded of the defendant on the 28th June, and the defendant re- objection. fused to pay the same. In consequence of this refusal, a rule nisi was obtained for an attachment against the

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A Judge's order enlarging the time for an arbitrator to make on the face of was enlarged with the desent, before the latter can for not peraward; but it seems that the consent may be collected cumstances so as to cure the

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defendant for not performing the award, the affidavits in support of which, stated, that the order had been duly executed, that a copy thereof and the three several rules of Court, whereby the orders above mentioned were made rules of Court, had been served upon the defendant, and a personal demand made of the sum awarded. On shewing cause against this rule, an affidavit was produced, on the part of the defendant, in which he stated, that the orders enlarging the time for the arbitrator to make his award were not made by the consent of himself or his attorney; that the orders were not served upon him at the time they bore date, and that when the rule making the submission to arbitration a rule of Court was served upon him, there was not any indorsement upon it enlarging the time for the arbitrator to make his award.

Marryat, for the defendant. The award in this case has not been made within the time prescribed by the original order, and therefore the defendant is not liable to an attachment. The subsequent orders for enlarging the time were not binding, inasmuch as they do not appear to have been made with the consent of the defendant or his attorney. It has been decided in Jenkins v. Law (a), that an agreement to enlarge the time for making an award must contain a consent that it shall be made a rule of Court; otherwise no attachment will be granted for not performing an award made under it. So here, unless the defendant expressly consented to enlarge the time for the arbitrator to make his award, he is not bound by an award not made with his consent. The arbitrator derives his authority from the consent of the parties, and if the award be not made within the time originally limited he is functus officio. So strict is the rule upon this subject, that where an award appeared to have been made out of the time originally given to the arbitrator by the rule of Court, but which rule reserved to him the power of en-

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larging the time, it was held not to be enough for obtaining an attachment for non-performance of the award, that the arbitrator states in his award, that he had enlarged the time, without verifying the fact by affidavit; and it should also appear, that the defendant had notice of such enlargement of the time within which the award was made, when served with a rule for the attachment; Davis v. Vass (a). So in Wolhenberg v. Lageman (b), where arbitrators had power to enlarge the time for making their award, and had enlarged it and made their award within the additional time, it was held that in order to bring the defendant into contempt for non-performance of the award, there must be an affidavit that the time has been enlarged; that the award was made within the enlarged time; and that the defendant has been personally served with notice of those facts. It is clear, therefore, under the circumstances of the present case, that the defendant cannot be brought into contempt without regular notice to him that the time has been enlarged, by orders to which he is a consenting party.

Chitty, contrà. The cases cited on the other side are inapplicable. It is sworn that the three several rules of Court, by which the orders mentioned in the affidavits were made rules of Court, had been duly served upon the defendant. It is not denied that the second and third orders by which the time for the arbitrator to make his award was enlarged, do not profess to have been made with the consent of the defendant or his attorney; but the presumption is, that the learned Judge would not have made those orders without the consent of the defendant: and, as those orders have been made rules of Court, it must be presumed that proper affidavits were filed to induce the Court to grant those rules. Without doubt, the defendant and his attorney attended before the arbitrator under the sanction of the second and third orders;

<sup>(</sup>a) 15 East, 97. (b) 6 Taunt. 251. 1 Marsh. 579.

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and if so, the orders had his consent; otherwise it is reasonable to suppose, that he would not have attended. This fact is not denied on the other side, and therefore it must be taken to be true. This is merely a technical objection, quite beside the justice of the case, and certainly would not have been made had the award been the other way. The question is, whether after the defendant has attended the arbitrator within the enlarged time, that is not such evidence of consent as will supply the omission in the second and third orders.

ABBOTT, C. J.—The fact last suggested does not appear upon affidavit, and therefore we can take no notice of it. It appears to me, that in order to bind the defendant, the orders for enlarging the time ought to have been expressed to be made with the consent of the defendant.

BAYLEY, J., concurred, and observed, that though the orders for enlarging the time had been made rules of Court, yet that was entirely a matter of course, and such rules were generally obtained upon counsel's signature; and, therefore, that circumstance would not give validity to the orders if they were imperfect in their terms. Discharging this rule would not prevent the plaintiff from coming to the Court again with better materials, particularly as it was suggested that the defendant had attended before the arbitrator under the orders for enlarging the time.

Holroyd, J.—I am of opinion that in order to bring the party into contempt it must appear on the face of the order, or by a sufficient affidavit of the fact, that the defendant gave his consent to the enlargement of the time. The original order gave the arbitrator power to enlarge the time by indorsement, but there is no affidavit before us that he had so enlarged it. The subsequent orders without consent were not binding upon the party. Suppose a rule of Court to be drawn up, by which the party was

ordered to abide the award of a particular individual, you could not bring him into contempt for not performing the award, without something to shew that the party gave his consent to the rule. So, here, I think you cannot attach this defendant for not performing the award, without shewing that the second and third orders were made with his consent.

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LITTLEDALE, J., was of the same opinion.

Chitty then suggested, that he should be able to produce an affidavit shewing that the defendant had consented to the enlargement of the time, if he were allowed an opportunity for that purpose.

. The COURT thought this not unreasonable, and therefore enlarged the rule until the following Saturday, in order to give the defendant time to answer such affidavit as the plaintiff should file.

#### CHADWICK v. BUNNING.

THIS was an action of assumpsit, to recover the sum of Where an ac-91. 17s., being the amount of an apothecary's bill, for medicines and attendance upon the defendant. At the trial, the plaintiff could only prove items in his account to the amount of 61.5s.; and the defendant produced evidence of tiff's demand payments on account, which reduced the plaintiff's demand by partial payto 11. 13s., for which sum the plaintiff had a verdict, and Campbell, last term, obtained a rule nisi, for en\_ jury found a tering a suggestion on the roll, that the defendant was an inhabitant of, and residing in the county of Middlesex, at the time of the action commenced; in order to entitle defendant, him to double costs, under the Middlesex County-Court who resided jurisdiction of the Middleses county-court, was entitled, under the 23 Geo. 2, c. 33, s. 19, to his double costs of suit.

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tion was brought in this Court, for a debt of 9l. 17s., and the plainwas reduced, ments on account, and the verdict for the plaintiff for Ì*l*. 13s. :-Held, that the within the

1826. CHADWICK v. BUNNING. act, 23 Geo. 2, c. 33, s. 19, and he relied on Bateman v. Smith (a).

Russell now shewed cause against the rule. The case of Bateman v. Smith, on the authority of which this motion was made, does not seem to have been decided with a due consideration of the words of the statute. In that case. undoubtedly, Lord Ellenborough is reported to have decided, that even assuming the original debt to have been more than 40s., still, as the jury had found the damages to be under that sum, the defendant was entitled to recover double costs by the very words of the Middlesex County Court act. It is desirable that that decision should be reviewed, and compared with other authorities in which a different construction has been put upon the same statute. The question is, whether, where a plaintiff brings an action in any of the superior Courts of Westminster, for a debt exceeding 40s., and obtains a verdict for a sum less than 40s., the defendant, who resided within the jurisdiction of the Middlesex county-court, is entitled to double costs under the stat. 23 Geo. 2, c. 33, s. 19. That section enacts, "that in case any action of debt, or action upon assumpsit, shall be commenced and prosecuted in any of his Majesty's courts of record at Westminster, and the defendant, at the time of such action brought, shall reside in the county of Middlesex, and be liable to be summoned to the said county-court, and the jury upon the trial of such cause shall find the damages for the plaintiff, under the value of 40s., &c., then, and in such case, no costs shall be awarded to the plaintiff in such action, but the defendant shall be entitled to recover double costs of suit." Now, it is submitted, that the words of this section are not imperative, and if not, then such a reasonable construction should be put upon it, as will meet the justice of a case, circumstanced like the present. It is contended, that this statute only applies to cases where the original

demand is under 40s.; and not to those where, by set-off, or other means, the ultimate balance of an account turns out to be less than that sum. This was the construction put upon the act by Eyre, C. J., in M'Collam v. Carr (a), where that learned Judge said, "Is there any case where the ultimate balance of an account only being under 40s., the Court has allowed a suggestion? I should pause upon such a case, since the most intricate point in accounts between merchant and merchant, might by this means come to be decided before a county-court. It seems to me, that the original demand ought to be under 40s." This is certainly a most reasonable interpretation of the statute; for otherwise, actions of the greatest magnitude and importance, brought to be tried before the superior Courts, would be subjected to the operation of this County-Court act, merely because, in the result, the plaintiff happened to recover damages under 40s. As, therefore, this point

seems not to have been maturely considered in *Bateman* v. Smith, with reference to the terms of the act of parliament, it is desirable that such a construction should be put upon it, as will avoid the inconvenience and absurdity which

Campbell, contrà, was stopped by the Court.

might often arise in the instances suggested.

ABBOTT, C. J.—I do not see how it is possible to put any other construction upon the very plain words of this act of parliament than was given to them by Lord *Ellenborough*, in *Bateman* v. *Smith*. The statute expressly declares, "that if the jury, upon the trial of the cause, shall find the damages for the plaintiff under the value of 40s., no costs shall be awarded to the plaintiff, but the defendant shall be entitled to double costs." Now this language necessarily includes cases where the action shall be brought for large sums of money; but the claim is reduced, by the verdict of the jury, to a sum under 40s. In the case of

(a) 1 Bos. & Pul. 223.

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McCollam v. Carr, the language of the statute seems not to have been sufficiently brought to the attention of my Lord Chief Justice Eyre; for otherwise, it is difficult to conceive upon what principle his judgment was founded. On the other hand, in Bateman v. Smith, Lord Ellenborough adverts in terms to the very words of the act. There may be very good reason for altering the statute, with a view to limit its operation in certain cases; but it appears to me that the case of Bateman v. Smith is decisive upon that point. But in the absence of all authority, and adverting merely to the particular language of the statute, I should come to the conclusion, that this was a case in which the plaintiff having recovered less than 40s., although his original demand exceeded that sum, the defendant was entitled to double costs.

BAYLEY, J.—I am of the same opinion. This is not like the case of Harsant v. Larkin (a), which arose on the Rochester Court of Requests' act, 48 Geo. 3, c. 51; by sec. 13 of which, an exception is made as to any sum being the belance of an account on demand, originally exceeding 51.; in which case the C. P. held, that although the plaintiff only recovered 11.2s., in an action brought for 34l., the defendant was not entitled to his costs. no exception of that kind in the statute. A like exception to that in the Rochester Court of Requests' act, is found in the Southwark Court of Requests' act; and therefore, in Fountain v. Young (b), it was held, that a debt originally above 51., but reduced by partial payments under that sum, was within the exception of the act. It seems to me, that the words of the present statute do not admit of any doubt. and that the case of Bateman v. Smith is decisive upon the point.

HOLBOYD, J.—The Middlesex County-Court act does make a provision for cases of a certain description; for it

<sup>(</sup>a) 7 J. B. Moore, 68. 3 B. & B. 267.

<sup>(</sup>b) 1 Taunt. 60.

says, "unless the Judge shall, in open Court, certify on the back of the record, that the freehold, or title to the plaintiff's land, principally came in question; or that an act of bankruptcy principally came in question at such So that the legislature seems to have had the operation of the general words under mature consideration at the time the statute passed; and I am clearly of opinion that those words embrace the present case.

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LITTLEBALE, J., concurred.

Rule absolute (a),

(a) Vide Clarke v. Askew, 8 East, 28; Horn v. Hughes, id. 347; Fitzpatrick v. Pickering, 2 Wils. 68; Grass v. Fisher, 3 Wils. 48; Bell v. Martin, 1 Bos. & Pul. 224; Pitts v. Carpenter, 1 Wils. 525; and Haward v. Hopkins, Doug. 449.

#### TAYLOR v. TAYLOR.

THIS was a rule calling upon the plaintiff to shew cause why the judgment entered upon a warrant of attorney given by the defendant, and the execution issued thereon, should not be set aside, as void under the statute 6 Geo. 4. c. 16, s. 108. The facts of the case, as disclosed upon affidavit, were these: -- On the 4th of November, 1825, the defendant executed a warrant of attorney, authorising his attorney to appear for him and to saffer judgment by nil dicit as of Trinity term then last past, or Michaelmas term then next, for 4000l., with a defeazance to be void on payment on demand of 2000/. On the 22nd of March, not set it aside 1826, the plaintiff signed judgment by nil dicit for 4000l., on motion. and sued out a writ of fieri facias thereon, directed to the sheriffs of London, returnable on Wednesday next after fifteen days of Easter, commanding him to levy 2041L On the 7th of April, the sheriff seized the goods of the defendant, under the writ. On the same day, the defendant committed an act of bankruptcy, and a docket was

Tuesday,

An execution issued upon a judgment obtained by default, confession, or nil dicit, and levied upon the goods of a bankrupt before his bankruptcy, is not void by 6 Geo, 4, c. 16, s. 108; and this Court will TAYLOR v.
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struck against him. On the 10th of *April*, a commission of bankruptcy issued against the defendant, and on the same day, notice of the docket and the commission was served upon the sheriff. On the 11th of *April*, the defendant was duly declared a bankrupt, and a provisional assignment was executed.

Copley, A. G., and Storks, shewed cause. First, the execution is valid; and, second, even if there is a doubt about its validity, it cannot be set aside upon motion in this Court. The ground of the motion is, that, under the circumstances stated in the defendant's affidavit, the plaintiff is barred by the statute 6 Geo. 4, c. 16, s. 108, from availing himself of this execution. That section enacts, "That no creditor having security for his debt, or having made any attachment in London, or any other place, by virtue of any custom there used, of the goods and chattels of the bankrupt, shall receive, upon any such security or attachment, more than a rateable part of such debt, except in respect of any execution and extent served and levied, by seizure upon, or any mortgage of or lien upon any part of the property of such bankrupt before the bankruptcy; provided that no creditor, though for a valuable consideration, who shall sue out execution upon any judgment obtained by default, confession, or nil dicit, shall avail himself of such execution to the prejudice of other fair creditors, but shall be paid rateably with such creditors." Now, as the execution here was levied by a seizure made before an act of bankruptcy committed, it is within the exception in the enacting part of that clause; for though the language of the proviso is certainly very comprehensive, still, that can never have been designed to apply retrospectively to avoid a judgment levied at any indefinite period before the bankruptcy. Here, the seizure was very shortly before the bankruptcy, but that does not affect the argument, because, as the clause itself points out no limitation in point of time, it must operate indefinitely if at

all, and must equally avoid an execution levied a few days or hours, and one levied several years before the bankruptcy. The proceedings here were strictly regular, and there is no imputation of any collusion or fraud. The Court, therefore, will support the execution, if possible. [Bayley, J. The seizure was regular, certainly; the only question is, how far this new statute can effect it. rate, I entertain great doubt whether this Court can set aside such an execution upon motion]. The whole clause is extremely obscure, and somewhat inconsistent with itself; the exception speaks of executions "levied," and the proviso of executions "sued out," which are perfectly different terms: but as this is an execution levied, and not merely sued out, it would seem to come within the exception, and not within the proviso; which was probably meant to apply to those cases only where a judgment by nil dicit is given pending an action. At all events the execution is not absolutely void, if voidable; this Court, therefore, will not set it aside on motion.

Scarlett and Justice, contrà. The words of the act of parliament are relied on as shewing that this execution is void. The enacting part of the 108th clause merely re-enacts the old law; the proviso excepts certain cases, but this is not one of them: and the exception in the enacting part was clearly intended to apply to those judgments which are not comprehended in the proviso, namely, judgments obtained on verdicts. But a verdict is a public act; this warrant of attorney is a secret act: and the main object of the legislature, as appears by the language they have used in the proviso, was to prevent the granting of secret securities. [Bayley, J. There may be ground for an application to the Lord Chancellor; but can we set aside the execution on motion?] It is submitted that this is the regular and proper course to be adopted. No hardship will be inflicted on the defendant, for he will after all be in as good a situation as the rest of the creditors.

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[Holroyd, J. The statute does not say that the judgment creditor shall come in and prove under the commission; but only that he shall not avail himself of the execution to the prejudice of other fair creditors]. It says that he shall be paid rateably with such creditors, which can be done only by his coming in and proving under the commission. [Holroyd, J. That by no means follows; the assignees may be entitled to recover against him, pro tanto, in an action at law, or they may be relieved upon application to the Lord Chancellor; but I do not think we can be asked to set aside the execution on motion]. This is a case of the first impression, depending upon the construction of a new and somewhat obscure legislative enactment; the Court must deal with it as in their wisdom, and discretion seems fit.

HOLROYD, J. (a). Upon the best consideration I can give this case, I think we ought not to interfere in the way prayed for; especially as the party praying has other, and in my opinion, more proper remedies to resort to. The act does not say that the execution shall be void, or that it shall not be available to the creditor; but only that he shall not avail himself of it to the prejudice of other fair creditors, but shall be paid rateably with such creditors. If the construction contended for on behalf of the assignees of the bankrupt is correct, and the execution is absolutely void, they may bring their action of trover against the sheriff for the goods: or if it is voidable only, they may apply to the Lord Chancellor: in either case they have their remedy. If the question upon the act is a question of law, which I very much doubt, it is fit the parties should have the opportunity of raising it on the record. To set aside the execution in the summary mode prayed for, where the true construction of the act is so doubtful, would, in my opinion, be a very

<sup>(</sup>a) ABBOTT, C. J., was sitting at Nisi Prius, and BAYLEY, J., was gone to chambers.

dangerous course for us to adopt: it is much safer to leave the parties to the other remedies I have pointed out.

LITTLEDALE, J., concurred.

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Rule discharged.

J. Holliday, an Infant, by W. Holliday, his Father, and Prochein Amy, v. ATKINSON and others, Executors of Mc. KNIGHT.

ASSUMPSIT on a promissory note by the testator to the plaintiff, in these words:—" 19th July, 1821. months after date, I promise to pay J. Holliday 1001., for value received." Plea, non assumpsit, and issue thereon. At the trial before Hullock, B., at the Carlisle summer lue received" assizes, 1825, the case was this. The plaintiff, at the date of the note, was a child of only nine years old, and the testator was a man of advanced age, in an imbecile state, The testator had been and died a few months afterwards. on intimate terms with W. Holliday, the father of the plaintiff, and acquainted with the plaintiff himself. evidence of the consideration for which the note was given was adduced; and it was contended, therefore, that the plaintiff could not recover. The learned Judge left the case to the jury, telling them that the words "for value received," in the note, furnished prima facie evidence of some legal consideration; that, in his opinion, therefore, the plaintiff was not bound to prove, but it lay on the defendants to disprove, the consideration; that many considerations for such a gift might be imagined; as affection Held, that

Wednesday, 3d May.

Assumpsit by the payee, an infant nine years old, of a promissory note "for vaagainst the executor of the maker. No consideration was proved. The Judge directed the jury that the words " for value re-No ceived," implied an existing legal consideration, and that affection for the payee, or friendship for his father, or a desire to avoid the legacy duty, would be sufficient :--neither of

these was a sufficient consideration; and, that as the jury had been misdirected in that respect, a new trial must be had, though, without that direction, the jury might have presumed an existing legal consideration.

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for the plaintiff, freindship for his father, or a desire to avoid the legacy duty, either of which would be sufficient in point of law; that if they thought any fraud had been practised, or that the testator was non compos when he made the note, they ought to find for the defendants; but if otherwise, for the plaintiff. The jury found for the plaintiff. A rule nisi for a new trial having been granted in *Michaelmas* term last,

Scarlett and Patteson now shewed cause. question raised at the trial was, whether the testator was competent in point of intellect to make the note. defendants did not attempt to impeach the consideration; therefore the jury were rightly directed, that it was not necessary for the plaintiff to prove it: especially as the note was expressed to be "for value received," which words of themselves imply a good primâ facie consideration. The jury having found by their verdict that there was a good consideration, the Court will sustain that finding, in the absence of proof to the contrary. There are, however, many cases to shew that any of the considerations suggested by the learned Judge to the jury, would be sufficient in point of law. In Woodbridge v. Spooner (a), where a note was given "for value received, and his kindness to me," Abbott, C. J., said, "there is no doubt that a proper and sufficient consideration existed for this note;" and Bayley, J., said, "it appears, on the face of the note, to have been given for a sufficient consideration." In Lee v. Muggeridge (b), it was held, that "a moral obligation is a good consideration for a promise to pay." In Tate v. Gilbert (c), Lord Loughborough would not go the length of ruling, that a promissory note delivered as a gift to take effect immediately, was void. The intention of the parties is in some degree to be looked to; and the intention here was plainly to bestow a gift. The motive for making

<sup>(</sup>a) 3 B. & A. 233.

<sup>(</sup>c) 2 Ves. jun., 111. 4 Bro. Ch.

<sup>(</sup>b) 5 Taunt. 36.

C. 286.

the gift in this form, might be to avoid the legacy duty; and that would not vitiate the transaction.

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Brougham and Wightman, contrà. It is conceded that a good consideration might have been presumed in this case, and if the learned Judge in his directions to the jury had confined his observations to that single point, there would have been no ground for disturbing the verdict. But he suggested to them as good considerations, several, all of which are clearly insufficient in law; namely, affection for the plaintiff, friendship for his father, or a desire to avoid the legacy duty. Now it was held in Bret's case (a), that, "natural affection of itself is not a sufficient consideration to ground an assumpsit;" á fortiori, therefore, friendship or affection for one totally unconnected by relationship, cannot be sufficient. Neither is the desire to avoid the legacy duty sufficient, because, in that case the note would not be payable till after the death of the donor, and such a note cannot be a donatio mortis causa, for that must be an absolute and immediate gift. Then as these insufficient considerations were suggested to the jury, and it is impossible to say that their verdict was not founded on the idea, that one or other of them was the real consideration for the note, it follows that the jury have been, or at least may have been misled: the defendants, therefore, are entitled to a new trial.

ABBOTT, C. J.—I think this case ought to be submitted to another jury. The use of the words "for value received" in a promissory note, undoubtedly raises the presumption of a legal consideration sufficient to sustain the promise; but it is a presumption only, and may be rebutted by the facts of the particular case. Now what are the facts here? Here is a note given to a child only nine years old, whose father is living, and the donor is a man imbecile in mind, and near the period of his death. It

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was for the jury, upon such facts, to say whether the note was given for any legal consideration. But that question was not left to them generally and simply, but with a direction, that affection for the son, or friendship for the father, or a desire to avoid the legacy duty, would be a good legal consideration, and might have been the existing consideration in the case. Now, mere friendship or affection, would clearly, according to all the authorities, not establish a sufficient legal consideration; and I am inclined to think, that the desire to avoid the legacy duty would be equally insufficient: because then the note would not be payable till after the donor's death, which here it might have been, and a promissory note is not good as a donatio mortis causa. It seems to me, therefore, that it is possible the jury may have been misled by the learned Judge's direction, and, consequently, that there ought to be a new trial.

The other Judges concurred.

Rule absolute.

Wednesday, 3rd May.

Quere.
Whether a
justice of the
peace has
jurisdiction to
commit a person for contemptuously
refusing to
take an oath,
and give evi-

# CROPPER v. HORTON, Esq.

TRESPASS against a justice of the peace for falsely imprisoning the plaintiff, without any reasonable or probable cause. Plea, not guilty. At the trial before Hullock, B., at the last summer assizes for the county of Lancaster, it appeared that the plaintiff had been summoned before the defendant to give evidence touching a breach of

dence touching a charge of riot alleged to have been committed by a person then under examination? Where the plaintiff was committed by a justice "for refusing to give evidence before him, touching a certain riot and disturbance," without shewing that there had been a person charged before the justices, and that the plaintiff was apprised of the existence of such charge, with respect to which he was required to be examined as a witness:—Held, that the warrant of commitment was no justification of the magistrate in an action of trespass.

the public peace, supposed to have been committed by a person named Wilsborough, then under examination before the defendant. There was, however, no distinct evidence of any specific charge being then depending before the defendant. The plaintiff being supposed to have some knowledge of the transaction, was called upon to give evidence upon the subject, and he said he knew nothing about the matter. The defendant then proposed that he should state this upon oath, but the plaintiff positively refused "to be sworn, and said he would not be examined at all." This took place on the 30th October. On the 1st November, the plaintiff was apprehended at the instance of the defendant, on a warrant of commitment directed to the keeper of the house of correction, reciting that the plaintiff had been summoned before him to give evidence "touching a certain riot and disturbance, but had refused to give evidence," and commanding the keeper of the house of correction to keep and detain him until he should be discharged by due course of law. defendant relied upon this warrant as conclusive evidence in his favour; but the learned Judge was of opinion, that it afforded no justification, and under his Lordship's directions, the plaintiff had a verdict. In Michaelmas term last, a rule nisi was granted for setting aside the verdict, and entering a nonsuit.

Cross, Serjt., now shewed cause. There are two questions in this case, first, whether a justice of the peace has jurisdiction to commit to prison a person who refuses to be examined on oath, and give evidence as a witness, even in a case where there is a specific charge of an offence depending before the justice, and of which he has legal cognizance; and second, whether, assuming that a justice might lawfully commit for such a cause, the warrant given in evidence in this case affords the defendant any justification. As to the first question, it is denied that a justice of the peace has any power of committing a person

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refusing to be sworn for the purpose of giving evidence, even where there is a complaint depending before the justice, and even admitting that the party knows something material to the matter in issue. Undoubtedly it may be illegal for a person under such circumstances to refuse to give evidence or to take an oath before the magistrate, but the mode of proceeding against him is by indictment at common law, and the justice has no authority to punish him immediately as for a contempt. No case has ever yet gone the length of deciding that a justice of the peace is vested with so dangerous a power. It is even doubtful whether a justice, under any circumstances, sitting in his own private room, has a right to commit for a contempt. In Petitt v. Addington (a), Lord Kenyon said, "As to the great question, whether a magistrate, not sitting as chairman of a court, but at his private office, could commit for a contempt, he must own he had a leaning on his mind, but still he would not deliver or intimate any opinion, as he wished it to be seriously considered and determined in Court." question was never afterwards brought before the Court, and therefore in the absence of all authority upon the subject the other way, it must be taken that a justice has no jurisdiction to commit a person refusing to take an oath and give evidence. [Bayley, J. It has been decided, that a justice of the peace may commit a feme covert who is a material witness upon a charge of felony, brought before him, and who refuses to appear at the sessions to give evidence or to find sureties for her appearance; Bennett v. Watson (b)]. That, though a very strong case, is mainly distinguishable from this, for there was, in that instance, a manifest reason for such a proceeding. The public was interested in preventing the due course of justice from being evaded by the obstinacy of a person refusing to give security, for appearing to give evidence against a person charged with a felony, after she had

<sup>(</sup>a) Peake's N. P. C. 62.

<sup>(</sup>b) 3 M. & S. 1.

in fact been sworn, and made a deposition; and, therefore, the justice might reasonably detain the woman for the purpose of giving her evidence, if she refused to find proper security for her appearance at the assizes. Here, in the first place, there was no evidence at the trial of any specific charge depending before the magistrate, rendering it necessary that the plaintiff should be examined as a witness, and therefore, the justice clearly had no authority to commit him for refusing to give evidence. Non constat but the object. of the examination may have been to inculpate the party himself, and therefore the plaintiff might reasonably refuse to be sworn to give evidence in a matter in which he might be himself implicated. If he were punishable at all, it could only be by indictment at the sessions or assizes; but here the plaintiff was committed for punishment in-Secondly, assuming that the justice had stanter (a). authority for such a proceeding, he must shew, if he relies upon his warrant as a justification, that the instrument itself is sufficient for that purpose. Now here the warrant given in evidence, was defective on the face of it. The warrant states that the defendant had committed the plaintiff to custody because he refused " to give evidence." The fact proved, however, was, that the plaintiff had refused to take an oath; so that the evidence was at variance with the warrant. But the decisive objection to the warrant is, that it does not state that there was any charge depending before the justice with respect to which the evidence of the plaintiff was material, and of which the plaintiff was apprised. The warrant, therefore, shews no legal cause of commitment, and it is clear that if this person had been brought up by habeas corpus, he must have been discharged on that ground. But independently of this objection, the warrant itself would not have been a justification of the defendant, without producing a regular conviction shewing that the commitment had a legal foundation; Hill v. Bateman (b). Here, no

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<sup>(</sup>a) See Rex v. James, 5 B. & (b) 1 Stra. 710. A. 894. Ante, vol. i., 559.

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such foundation was laid, and the evidence produced varied from the warrant, for by the former the offence imputed to the plaintiff was in refusing to take an oath upon being required; whereas the latter assigns the cause of commitment to be the refusal to give evidence. On these grounds, the plaintiff is clearly entitled to retain the verdict.

Scarlett and E. Alderson, contrà. Certainly no case is to be found in which the precise question first propounded on the other side, has been decided. In Bennett v. Watson, that point did not arise, and though that itself is a very strong case, still the commitment proceeded on the ground, that the woman was guilty of a contempt, in refusing to find sureties for her appearance at the sessions. In that case the woman had been examined before the justice on a charge of felony, she was guilty of a contempt in peremptorily refusing to find sureties for her appearance to give evidence at the sessions. Here the plaintiff refused to be sworn, or give any evidence whatever touching the matter then under inquiry. It is plainly to be collected from the facts proved at the trial, that a person named Wilsborough was then under accusation for a Whether rightly or not, is not the breach of the peace. question; but the plaintiff being summoned before the magistrate, as a witness likely to give material evidence upon the subject, he in express terms tells the defendant, that he will not be sworn, and that he will give no evidence whatever. The question then is, whether a justice of the peace, lawfully proceeding to take examinations with a view to the trial of a man charged with a misdemeanour, has jurisdiction to commit a person who refuses peremptorily to give evidence, or be sworn upon a matter of which the justice has cognizance. It is not disputed that the justice has jurisdiction to administer an oath, to inquire into the subject then submitted to his consideration. vain, therefore, has the justice these powers, if he has not

jurisdiction to enforce his authority, by committing a person who contemptuously refuses to give evidence which is essential to the ends of public justice. If it be once established that a justice of the peace has no jurisdiction to commit under such circumstances, the most serious consequences may ensue, as respects the interest of the public, for this principle may be extended to crimes of the highest nature. Suppose a person charged with a murder, and a witness who can prove the offence peremptorily refuses to be examined before the justice, is it to be endured that the justice has no power of compelling him to give evidence, or detaining him until he submits to examination on oath? Were such a rule as this to prevail, the greatest criminals might escape punishment, unless the magistrate had the summary power of enforcing the witness to take an oath, and give such evidence as is essential to justice. The mode of proceeding by indictment, as suggested on the other side, would not avail to avert such consequences, because pending such a proceeding, the party accused of the crime may be acquitted, or discharged, for want of the necessary evidence of his guilt. This, undoubtedly, is a question of the utmost importance to the criminal justice of the country, and unless the Court shall hold, that a witness brought before a magistrate under such circumstances may be committed, if he refuses to give evidence, the most grievous consequences will follow. No mischief can ensue from such a course of proceeding, for if a person is taught to understand, that he is bound to give evidence upon a matter properly falling within the cognizance of the magistrate, he will probably submit himself to examination; but it is not to be tolerated that in such a case, the party may set the authority of the justice at defiance. In the present case, the plaintiff need not have remained in custody; for having been committed until discharged by due course of law, he might have tendered bail until the matter was disposed of at the sessions. Even assuming his offence to have been only indictable, still the justice would have had

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jurisdiction to commit him in default of bail. Then, secondly, assuming that the warrant in this case be not sufficiently formal, still it affords a defence to the justice in an action of trespass. The warrant shews, at least, that the defendant has acted under colour of his office, and therefore it is an answer to the present action.

BAYLEY, J.—The facts found in this case do not raise the question first submitted to our consideration, and therefore I shall studiously forbear giving any opinion upon that point. The question then is, whether the warrant of commitment given in evidence, or even the facts proved, dehors the commitment, shew a sufficient cause for the imprisonment. At all events, before the commitment could be justified, it must distinctly appear, that the party committed was apprised that there was some person under charge against whom his evidence was required to be given. Now there is nothing either in or out of the warrant, to enable me to say, that there had been an information upon oath, or any person charged before the magistrate, so as to render it necessary that the plaintiff should be examined as a witness. The parol evidence upon this subject, is very unsatisfactory; and on reading the warrant, I cannot collect that there had been an information on oath before the magistrate against any particular person under charge, for it contains merely a general assertion, that the plaintiff was committed for refusing to give evidence touching a certain riot and disturbance committed. I am, therefore, of opinion, that the defendant has not made out a sufficient justification of the alleged trespass.

HOLROYD, J.—I am of the same opinion. Assuming that the magistrate had power to commit a person refusing to give evidence (a question which cannot be decided in this case for want of sufficient facts to raise it), still it does not appear that there was any specific charge before the magistrate, of which the plaintiff was apprised, so as to

bring the latter into contempt for refusing to give evidence. Before a party can be brought into contempt for refusing to give evidence before a magistrate, he ought to be fully apprised that there is some information or charge for an offence then under inquiry before the justice. evidence and the warrant are both silent upon that point, and therefore I think the verdict ought not to be disturbed. Suppose, instead of pleading the general issue, the defendant had pleaded a special justification, it could not have been alleged that there was any specific charge then depending.

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LITTLEDALE, J.—The case of Bennett v. Watson does not immediately bear on this case, because the circumstances are very different; but without professing to give any opinion upon the general question here attempted to be raised, I think the verdict was right, for the reasons stated by my learned brothers.

Rule refused.

## The King v. W. H. Ellis.

THIS defendant was tried before the court of quarter sessions for the city and county of Exeter, upon an indictment charging "that he, on, &c., at, &c., one piece of the enacts," that current coin of this realm called a shilling, of the value of shall steal any one shilling, of the money, goods and chattels of Susan money, &c., Newman, feloniously did steal, take, and carry away, ter, and shall

Friday, 5th May.

The statute 3 G. 4, c. 38, s. 2, which from his masbe convicted

thereof, and be entitled to benefit of clergy, he, instead of being subjected to such punishment as may now by law be inflicted upon persons so convicted, and entitled to benefit of clergy, may be transported for fourteen years;" does not extend to cases of petty

A judgment of transportation for fourteen years, if bad for excess, is bad in toto; and cannot operate as a good judgment of transportation for seven years.

Where a court of quarter sessions have passed an erroneous judgment of transportation, this Court will not send it back to be amended, but will reverse it, on writ of error.

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against the peace," &c.: a second count charged, that defendant "on, &c., aforesaid, at, &c., aforesaid, was servant to Susan Newman, and being such servant, then and there, one other piece of the current coin of this realm called a shilling, of the value of one shilling, of the money, goods and chattels of the said Susan Newman, feloniously did steal, take, and carry away, against the form of the statute, &c., and against the peace," &c. The defendant was found guilty generally of the whole indictment, and received judgment of transportation for the term of fourteen years. Upon this judgment a writ of error was brought, assigning for error, that by the law of the land the defendant could not, for the offence of which he had been convicted, be transported for the term of fourteen years, or for any longer term than seven years.

Chitty, for the defendant. The offence charged in the indictment, and of which the defendant has been convicted, is petty larceny, for which he was liable to transportation for seven years only. The judgment, therefore, cannot be supported. The case does not come within the statute 3 Geo. 4, c. 38, s. 2. By that it is enacted, "that if any clerk, apprentice, or servant whatsoever, shall feloniously steal any goods, chattels, money, bond, bank-note, checque upon a banker, or banker's draft, promissory note for the payment of money, bill of exchange, or other valuable security or effects, from or belonging to, or in the possession, custody, or power of his, her, or their master or masters, mistress or mistresses, or employer or employers, and shall be lawfully convicted thereof, and be entitled to the benefit of clergy, then, and in every such case, such offender or offenders, instead of being subjected to such punishment as may now by law be inflicted upon persons so convicted, and entitled to the benefit of clergy, may, at the discretion of the Court by or before which he, she, or they shall be convicted, be ordered and adjudged to be transported beyond the seas for any term not exceeding fourteen years; or to be imprisoned only, or to be imprisoned and kept to hard labour in the common gaol, house of correction, or penitentiary house, for any term not exceeding three years." This was clearly meant to apply, not to cases of petty larceny, where the benefit of clergy could not be prayed; 4 Bl. Com. 374; but to those cases where the party convicted is necessarily driven to his prayer of the benefit of clergy, in order to save him-By the common law, petty self from capital punishment. larceny was never punishable with death, but only with imprisonment, or whipping; 3 Inst. 218; 4 Bl. Com. 238; and by the common law, as has been already hinted, clergy was not allowable in petty larcenies, or mere misdemeanours; 4 Bl. Com. 374. The 4 Geo. 1, c. 11, was the first statute that conferred upon the Courts the discretionary power of ordering transportation as an original sentence (for though it had been previously inflicted, that was only as a commutation for a heavier punishment (a)); and that expressly mentions petty larceny, by name, as one of the offences so punishable, and expressly limits the period of the transportation to seven years. Here the Court stopped him, and called upon

Parke, contrà, who made three points: first, that the judgment of transportation for fourteen years, was valid in point of law; second, that at any rate it was valid as a judgment of transportation for seven years; and third, that supposing the judgment could not be supported in either of those points of view, still this Court could not reverse it, but must remand the defendant to the Court below, in order that he might receive the proper judgment. First, the 3 Geo. 4, c. 38, s. 2, does authorise the passing judgment of transportation for fourteen years in this case. The punishment of transportation for seven years was allowable in cases of petty larceny, as well upon servants robbing their masters as others, long before the passing of this

(a) See 1 Bl. Com. 137, and note 14, by Christian.

The King v. Ellis.

## CASES IN THE KING'S BENCH;

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statute; the object, therefore, of the new enactment, must have been to render such offenders liable to the increased punishment of transportation for fourteen years: for otherwise, it had really no object at all. If the words; "and shall be entitled to the benefit of clergy," had not been introduced, this question could not have arisen; and as the object of the legislature is clear, they must be so construed as to give effect to it, which may be done by reading them, "and shall not be excluded from the benefit of clergy." The expression in the 3 Geo. 4, c. 38, s. 2, is copied from the preceding act of 4 Geo. 1, c. 11, where it bears the meaning now contended for; and the words being the same in both cases, must receive in both the same construction. Second, this is, at least, a valid judgment of transportation for seven years. A judgment may be bad in part, but good for the residue, Rex v. There the defendant, having been found guilty upon an indictment for a contempt against a magistrate in the execution of his office, received judgment of imprisonment for a month, and to ask pardon, and to advertise it: and though the two latter parts of the judgment were held to be void, the former was held to stand good. Where, indeed, a judgment is defective in any of the essential parts of the punishment imposed by law upon the particular offence, it is bad in toto; Rex v. Walcot (b), Rex v. Read (c); but here the judgment is not defective in any respect; the objection to it is, that it is excessive: there seems no reason, therefore, why that part which is warranted by law, should not stand good, and the residue only be held bad, as in the case of Rex v. Collyer (a). Third, even if the judgment is bad in toto, this Court will not reverse it upon error, but will award a procedendo to the Court below, commanding them to pronounce the proper judgment. That was the course

<sup>(</sup>a) 1 Wils. 332.

<sup>(</sup>b) 4 Mod. 395.

<sup>(</sup>c) 16 East, 404.

adopted in Rex v. Kenworthy (a), which is a very recent decision, and an authority in point.

The Kino

The case was argued on a former day in this term; when the Court took time for consideration. Judgment was now delivered by

ABBOTT, C. J.—This was a writ of error, brought to reverse the judgment of a court of quarter sessions, by which the prisoner, who had been convicted of petty larceny, was sentenced to transportation for the term of fourteen years; and the error assigned was, that the offence charged being only petty larceny, the prisoner could not by law receive judgment of transportation for fourteen years, but for seven only. In support of the judgment, the recent statute of 3 Geo. 4, c. 38, s. 2, was relied on. That section, after reciting that frequent depredations had been committed by servants, to the serious detriment and loss of their masters, and that it was expedient that such offenders, when entitled to the benefit of clergy, should be made liable to a more severe punishment, enacts, "that if any servant shall feloniously steal any goods, chattels, money, &c., from or belonging to his master, and shall be lawfully convicted thereof, and be entitled to the benefit of clergy, then, and in every such case, such offender, instead of being subjected to such punishment as may now by law be inflicted upon persons so convicted, and entitled to the benefit of clergy, may, at the discretion of the Court by or before which he shall be convicted, be ordered and adjudged to be transported beyond the seas, for any term not exceeding fourteen years." It was contended, in argument, that the words 'entitled to the benefit of clergy,' must be construed as confining the operation of the clause to those cases, where the party convicted is compelled to pray the benefit of clergy, in order to save himself from the punishment of death; and that, as petty larceny was an offence never

(a) Ante, vol. iii., 173. 1 B. & C. 711.

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punishable with death, and for which, therefore, it could never be necessary for the party to pray the benefit of clergy, it followed that a person convicted of petty larceny was not 'entitled to the benefit of clergy,' within the meaning of the legislature. Now, a previous statute, 4 Geo. 1, c. 11, s. 1, enacted, "that where any persons had been convicted of any offence within the benefit of clergy, and were liable to be whipped or burned in the hand, as also where any persons should be thereafter convicted of grand or petty larceny, or of any felonious stealing, or taking of money, goods, &c., either from the person or the house of any other, or in any other manner, and who, by law, should be entitled to the benefit of clergy, and liable only to the penalties of burning in the hand, or whipping, it should be lawful for the Court before whom he should be convicted; instead of ordering any such offender to be burned in the hand, or whipped, to order and direct that he should be sent to some of his Majesty's colonies and plantations in America, for seven years." In that statute, which was the first that authorised Courts of law to pass judgment of transportation on offenders, petty larceny is mentioned by name: in the 3 Geo. 4, c. 38, it is not. As the object of the latter statute is to increase punishment, we are of opinion that it ought to be construed strictly; and as it is, certainly, matter of doubt, whether the legislature there had in view petty larceny, or grand larceny only, and the latter is the only description of larceny with respect to which the party convicted is compelled to pray the benefit of clergy, in order to save himself from severer punishment; we think it the safer course to lean to the side of mercy, and confine the operation of the statute to cases of grand larceny. Our decision, therefore, upon that point is, that the judgment of the Court below is excessive, and not warranted by law. It was next argued, that the judgment, if bad for the excess, was nevertheless good as a . judgment of transportation for seven years; but we do not assent to that proposition: for where a prisoner is adindged to be sent out of the country for fourteen years, what jurisdiction or authority can say that he is to be discharged at the end of seven years? Lastly, it was argued, that the judgment could not be reversed, but that the prisoner should be remanded to the court below, there to receive the proper judgment; and Rex v. Kenworthy (a) was cited as an authority in point. There is, however, an essential distinction between that case and the present. There, the court below had passed no judgment whatever upon the prisoner, and, therefore, this Court remanded him to the court below to receive the proper judgment: here, the court below has passed a judgment upon the prisoner, but which is erroneous; and the judgment being erroneous, we think we cannot send it back to the inferior court to be amended. The result of our opinion, therefore, is, that the judgment of the court below must be reversed.

Judgment reversed.

(a) Ante, vol. iii., 173. 1. B. & C. 711.

FREE, clerk, v. BURGOYNE.

DECLARATION in prohibition stated, that by an act of parliament of 27 Geo. 3, c. 44, s. 2, it was, inter alia, enacted, "that no suit should be brought in any ecclesiastical Court for fornication or incontinence, after the expiration of eight calendar months from the time when such offence should have been committed; nor for fornication, at any time after the parties should have lawfully intermarried." But that defendant had lately, to wit, on statute 27 G. October, 1824, against the form of the statute, the drawn plaintiff into a plea in the spiritual Court, touching and concerning the crime of fornication and incontinence, months after alleged to have been committed by plaintiff with divers the offence

1826. The King v. ELLIS.

·Friday, 5th May.

A suit in the spiritual Court against a clergyman for incontinence. where the object is to procure his suspension or deprivation, is not within the 3, c. 44, s. 2, and need not be instituted within eight committed.



females in the years 1810, 1812, 1813, 1814, 1815, 1817, and 1822, by objecting, articling, and libelling against plaintiff, in the said spiritual Court, in and by a certain libel, or articles, in manner following:-The declaration then set out the libel, which charged the plaintiff with several offences. The first article stated, that by the ecclesiastical laws, canons and constitutions of the church of England, all clerks and ministers in holy orders, are particularly enjoined and required to be grave, decent, reverend, and orderly in their general deportment, and to abstain from all fornication or incontinence, profaneness, &c., under pain of deprivation of their ecclesiastical benefices, suspension from the exercise of their clerical functions, or such other ecclesiastical punishment or censures, as the exigency of the case and the law thereupon may authorise and require. The second article averred that the plaintiff was a clerk in holy orders. The libel then detailed various acts of fornication and incontinence, as alluded to in the declaration, as also many other acts of misconduct. The declaration concluded in the ordinary form, by averring that, notwithstanding the King's writ of prohibition, defendant continued to prosecute the plea in the spiritual Court. Demurrer to the declaration, and joinder in demurrer.

Campbell, in support of the demurrer. By the stat. 1 Hen. 7, c. 4, archbishops, and bishops, and other ordinaries having episcopal jurisdiction, are empowered to punish and chastise priests and clerks convicted before them of fornication or incontinence; and that act contains no limitation of time for the commencement of the suit. That act is neither recited, nor in any way alluded to by the 27 Geo. 3, c. 44, which would doubtless have been the case if the latter had been intended to repeal or vary the former, with respect to the limitation of the time within which suits must be commenced. The 27 Geo. 3, c. 44, is entitled, "An Act to prevent frivolous and vexatious Suits

in Ecclesiastical Courts;" but the legislature never can have intended to designate a suit against a clergyman for grossly immoral conduct as a "frivolous and vexatious suit:" it is clear, therefore, that the modern statute was not designed to interfere with proceedings had under the old statute. The present case is not within the mischief intended to be remedied by the new act; and, therefore, though it may be within the words, it cannot be construed as within the spirit, or purview of it; Com. Dig. Parliament (R. 16). The provision, that no suit for fornication shall be commenced at any time after the parties shall have lawfully intermarried, seems hardly applicable to the case of a clergyman; for he may so have misconducted himself before the marriage, as to be utterly unfit for his situation, and the mere act of marrying cannot purge that misconduct, or alter his unfitness. The articles in the libel which charge the plaintiff with incontinence, have been admitted by the Judge of the court below; upon that part of the case, therefore, there has been a judgment already given against the plaintiff (a).

Denman, C. S., contrà. This is clearly a case within both the letter and the spirit of the 27 Geo. 3, c, 44, s. 2, and therefore a prohibition must be granted. It is not necessary, and would, perhaps, be impossible to contend, that the new statute operates as a repeal of the 1 Hen. 7, c. 4; the argument is, that the limitation of the time within which these suits are to be commenced, over-rides both the statutes. The title of the 27 Geo. 3, is general, "An Act to prevent frivolous and vexatious Suits in Ecclesiastical Courts," and it recites that "it is expedient to limit the time for the commencement of," not suits against certain persons, but "certain suits, in the ecclesastical courts." Upon what principle, then, can it be said, that clergymen are not within the operation of that statute? They are not expressly excepted, and if such an exception had been

(a) 2 Addams' Ecc. Rep. 414.

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intended, it would have been both easy and natural to have expressed it. [Holroyd, J. In a suit against a clergyman, the object may be something more than mere punishment pro salute animæ; it may be deprivation: and is not that the object here]? Not necessarily. The spiritual Court cannot create for itself a jurisdiction by viewing the same offence in two different aspects: Galizard v. Rigault (a); and the form of the suit is the same in all cases.

Campbell, in reply. The ground of the suit in the spiritual Court is, that the plaintiff is a clergyman who, by his misconduct, has rendered himself unfit to fill that office. The short question before this Court is, whether that suit is a suit for fornication, within the operation of the 27 Geo.

3. It is submitted that it is, and that suspension or deprivation, not punishment pro salute animæ, is its object; and though the libel may not set out that object specifically, still if the spiritual Court have jurisdiction to punish in that way, there is no reason why this Court should interfere by prohibition to prevent them from so doing.

The case was argued on a former day in this term, when the Court took time for consideration. Judgment was now delivered, by

ABBOTT, C. J.—This was a proceeding in prohibition, grounded on the statute 27 Geo. 3, c. 44, s. 2, which limits the time for the commencement of certain suits in the ecclesiastical Courts. The declaration states, that the defendant had, in October, 1824, against the form of the statute, drawn the plaintiff into a plea in the spiritual Court, touching and concerning the crime of fornication and incontinence, alleged to have been committed by the plaintiff, in the years 1810, 1812, 1813, 1814, 1815, 1817, and 1822. The title of the libel clearly shews, that it was not exhibited for the offence of incontinence only, but for

several others; as neglecting to perform divine service; using the porch of the parish church as a stable; converting to his own use the lead on the roof of the chancel of the church; refusing, neglecting, and delaying to baptize the children of the parishioners; refusing and neglecting to bury the dead; and exacting illegal fees for baptisms and burials. With respect to all those matters, it is clear that a consultation must go; and we then come to the construction of the statute, 27 Geo. 3, c. 44, s. 2. That enacts, "that no suit shall be commenced in any ecclesiastical Court, for fornication or incontinence, after the expiration of eight calendar months from the time when such offence shall have been committed; nor shall any prosecution be commenced or carried on for fornication at any time after the parties offending shall have lawfully intermarried." It was contended, in argument, that this statute extended to the clergy as well as the laity; and we are of opinion that it does, so far as the clergy and the hity are on the same footing, that is, where the suit is pro salute anime, or, reformatione morum; but that it was not intended to limit the time for proceeding against a clerk, as such, for suspension or deprivation. Such a suit cannot be considered as "frivolous" or "vexatious," and is not within the mischief or the purview of the act. Reformation of manners, or the soul's health, is not the object, at least not the only object, of the present suit. The first article of the liber states, "that by the ecclesiastical laws, canons, and constitutions of the church of England, all clerks and ministers in holy orders, are particularly enjoined and required to be grave, decent, reverend, and orderly in their general deportment, and to abstain from all fornication or incontinence, profaneness, &c., under pain of deprivation of their ecclesiastical benefices, suspension from the exercise of their clerical functions, or such other ecclesiastical punishment or censures, as the exigency of the case, and the law thereupon, may authorise and require." The second article states, that the

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present plaintiff is a clerk, or minister in holy orders, of the church of England. These articles plainly shew, that one at least of the objects of this suit, was to procure the suspension or deprivation of the plaintiff; a jurisdiction which the spiritual Court could not possibly exercise over a layman. In other temporal matters, the forgery of orders for instance, no proceeding can be had against a layman, as such; but if he obtains a benefice, a suit may be instituted against him in the spiritual Court, for deprivation. Slader v. Smallbrooke (a). We are, therefore, of opinion, that as to the charge of incontinence, the spiritual Court may proceed for the purpose of deprivation: and our judgment will be, that the prohibition shall stand so far as concerns the proceeding upon the charge of fornication pro salute animæ, or reformatione morum; but that so far as concerns the proceeding upon that charge for the purpose of suspension or deprivation, a consultation must be awarded. This was the course adopted in the case of Townsend v. There, a parish clerk was charged with Thorpe (b). many offences which were punishable at the common law; and the spiritual Court was prohibited from proceeding against him with a view to reformation, or the soul's health, but was allowed to proceed against him for the purpose of depriving him of his office. That case has been since objected to, upon the ground that the office of a parish clerk is a temporal, and not a spiritual office, and that the spiritual Court, therefore, has not jurisdiction to suspend or deprive him (c); that objection is probably well founded: but the other parts of the case have never been questioned, and they furnish an authority for our present decision.

Prohibition as to proceeding for incontinence, with a view to deprivation; for the other proceedings, a consultation.

<sup>(</sup>a) 1 Lev. 138. 1 Sid. 217.

<sup>(</sup>c) See 2 Str. 942. Id. 1108.

<sup>(</sup>b) 2 Ld. Raym. 1507.

<sup>2</sup> Brownl. 38. 1 Bur. 367.

Doe, on the demise of John Birtwhistle, v. Vardill.

EJECTMENT for lands in several parishes in the county of York. Plea, not guilty; and issue thereon. At the trial before Bayley, J., at the Yorkshire Lent assizes, 1825, a special verdict was found, substantially as follows:

William Birtwhistle, being seised in his life-time, in his demesne as of fee, of and in the premises in question, died in England. so seised on the 12th of May, 1819, intestate, and without issue. All his brothers died in his life-time, unmarried, and without issue, except his brother Alexander, who married and had issue, in the manner and at the time Alexander Birtwhistle went from hereinafter stated. England into Scotland in the year 1790, and became and was domiciled there; and there remained and dwelt so domiciled until the time of his death, hereinafter stated. One Mary Purdie was also a person dwelling and remaining in Scotland, domiciled there, during the whole of the time in which Alexander Birtwhistle was so domiciled Alexander Birtwhistle and Mary Purdie, being so domiciled in Scotland, he cohabited with her, and begot upon her John Birtwhistle, the lessor of the plaintiff, which said John was the only son of the said Alexander and Mary, and was born in Scotland on the 15th of May, 1799. After the birth of the said John, that is to say, on the 6th of May, 1805, the said Alexander and Mary were married in Scotland, according to the laws of Scotland. On the 5th of February, 1810, the said Alexander, the father of the said John, died in Scotland, seised to him and his heirs of divers lands and tenements there situate, leaving the said John him surviving, who, after the death of his father, was duly, according to the laws of Scotland, served heir to the said lands and tenements of the said Alexander, and now holds and enjoys them in his own right; he having, from his birth, hitherto dwelt and remained in

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and Ireland only excepted; and that wherever it does prevail, the subsequens matrimonium does, by a fictio juris, by that presumptio juris et de jure, which cannot be gainsaid, have relation back to the time of procreation, and renders the child, not legitimatus only, but to all intents and purposes legitimus. Second, this being the general law of Europe, ought, by the comity of nations, to prevail here; for this is a question of personal status, not dependent upon any municipal law, but upon international law, and must be decided by the rules and maxims of the latter. Now, what are they? nius, tit. 1, "de jure personali," says, "Status est personæ conditio aut qualitas, quæ efficit ut hoc vel illo jure utatur, ut esse liberum, esse servum, esse ingenuum. esse libertinum, esse alieni, esse sui juris." Huber, in his treatise "de conflictu legum," B. 1, tit. 3, introduces this subject by these words:-" Seepe fit ut negotia in uno loco contracta, usum effectumque in diversi locis imperii habeant, aut alibi dijudicanda sint;" and then proceeds to lay down three rules (two only of which are applicable to the present case), by which to determine how far the law of one country ought to prevail in another. namely:-- Leges cujusque imperii vim habent intra terminos ejusdem reipublicæ, omnesque ei subjectos obligant, neque ultra." And again, "Rectores imperiorum id comiter agunt, ut jura cujusque populi, intra terminos ejus exercita, teneant ubique vim suam, quâtenus nihil potestati aut juri alterius imperantis ejusque civium præjudicetur." He then goes on to apply these rules to the particular subject now before the Court. In s. 8, he says, "Matrimonium pertinet etiam ad has regulas. citum est eo loco ubi contractum et celebratum est, ubique validum erit, effectumque habebit, sub eadem exceptione. præjudicii aliis non creandi." In s. 9: "Porro, non tantum ipsi contractus ipsæque nuptiæ, certis locis rite celebratæ ubique pro justis et validis habentu, sed etiam jura et effecta contractuum nuptiarumque in üs locis

recepta, ubique vim suam obtinebunt." And in s. 12: "Ex regulis initio collocatis etiam hoc axioma colligitur. Qualitates personales certo loco alicui jure impressas, ubique circumferri et personam comitari, cum hoc effectu ut ubivis locorum eo jure quo tales personæ alibi gaudent vel subjecti sunt, fruantur et subjiciantur." Undoubtedly. these rules and anxioms can apply here in those cases only where our own law recognises the existence of a corresponding personal status, and where they are not directly opposed to our own settled law; they could not therefore apply to the personal status of slavery, which is unknown to our law: but there are several instances in which the laws of foreign nations have been allowed to operate here. Lord Stowell, in Dalrymple v. Dalrymple (a), said, that the question being entertained in an English Court, must be adjudicated according to the principles of English law applicable to such a case: but that the only principle applicable to such a case by the law of England was, that the validity of Miss Gordon's marriage rights must be tried by reference to the law of the country where, if they existed at all, they had their origin. That, having furnished that principle, the law of England withdrew altogether, and left the legal question to the exclusive judgment of the law of Scotland. Upon the same principle, it has been held that a marriage duly solemnized according to the laws of the country where the parties were domiciled, cannot be annulled by the law of divorce prevailing in another country. Lolly's case (b), recognised by Lord Eldon, in Tovey v. Lindsay (c). The same principle of comity between nations, has been adopted by this country with respect to other contracts made in foreign countries; Feaubert v. Thurot (d); Freemoult v. Dedire (e); Alves v. Hodgson(f); Male v. Roberts(g); Inglis v. Usher-

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<sup>(</sup>a) 2 Hagg. 58. See Lacon v. Higgins, D. & R.'s N. P. C. 38.

<sup>(</sup>b) Russ. & Ry. C. C! 237.

<sup>(</sup>c) 1 Dow, 117.

<sup>(</sup>d) Prec. Cha. 207.

<sup>(</sup>e) 1 P. Wms. 429.

<sup>(</sup>f) 7 T. R. 241.

<sup>(</sup>g) 3 Esp. 163.

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wood (a). In cases of bankruptcy, also, it has been repeatedly held that the bankrupt laws of one country are to be recognised and given effect to in another; Sill v. Worswick (b); Hunter v. Potts (c); Richards v. Hodson (d); Potter v. Brown (e); Burrows v. Jemino (f). Again, the same rule has been acted upon in the distribution of personal property in cases of intestacy, where it has been held that the law prevailing in the country where the intestate was domiciled, must govern the distribution of his personal property in this country; Gordon v. Gor-. don(g); Somerville v. Somerville (h); Brodie v. Barry (i); Ryan v. Ryan (j); Balfour v. Scott (k). Third, there have been two cases, upon this very question of legitimacy, decided in the House of Lords, so closely resembling the present, as to furnish a very strong argument by analogy in support of this lessor of the plaintiff's claim, and to shew, that if his case had then been under consideration, the decision would have been in his favour. The first is the case of Sheddon v. Patrick (1), first decided in the court of Session, and the judgment afterwards affirmed in the House of Lords. That case has been shortly stated thus: - W. Sheddon, of the city of New York, in America, entered into a regular marriage, according to the law of America, with a woman who had previously borne him two children, William and Jane; and he died a few days afterwards, leaving an estate in the county of Ayr, in Scotland, not disposed of by will, or other settlement. marriage had not the effect of rendering legitimate the children in America. It was held, that the son William could

<sup>(</sup>a) 1 East, 515.

<sup>(</sup>b) 1 H. Bl. 665.

<sup>(</sup>c) 4 T. R. 182.

<sup>(</sup>d) 4 T. R. 187, cited.

<sup>(</sup>e) 5 East, 124.

<sup>(</sup>f) 2 Str. 733. See Mont. Dig. B. L. 324, cum notis.

<sup>(</sup>g) 3 Swanst. 400.

<sup>(</sup>h) 5 Vesey, 750.

<sup>(</sup>i) 2 Vesey & B. 127.

<sup>(</sup>j) 2 Phil. 332.

<sup>(</sup>k) 6 Bro. P. C. 550.

<sup>(1)</sup> Decided in 1808. Not reported. But a note of it, as above, to be found in the printed case laid before the House of Lords, in the case of Strathmore v. Boves.

not inherit the Ayrshire estate, because his legitimacy or illegitimacy must be determined according to the laws of America, where his parents were domiciled and himself born, and by the laws of that country he was illegitimate. From that case, two conclusions must necessarily be drawn: - first, that the consequences of a marriage depend upon, and are controlled by, the laws of the country where that marriage is solemnized; and second, that a child cannot be illegitimate in one country, and legitimate in another. The decision in that case has been recognised, first, by Lord Eldon, in Gordon v. Gordon (a); and since, by Lords Eldon and Redesdale, in Strathmore v. Bowes (b). The facts of the latter case were these:—the late Lord Strathmore was a peer both of England and Scotland, but had for many years been domiciled in England, where he had cohabited with a woman by whom he had a son. Finding himself at the point of death, he for the avowed purpose of making his son legitimate, married the mother according to the laws of England, and died the following day. The question before the House of Lords was, whether that son, born in this country, of parents not then married, but who were after his birth legally married, could inherit the Scotch title and estates; and it was decided that he could not: because, by the law of the country where his parents were domiciled and he was born, the subsequent marriage did not render legitimate, children born before marriage. Lord Eldon said, he could not see any material distinction between the case of the claimant there and that of Sheddon; and Lord Redesdale said, the law that attached to him at his birth, was the law of England; and, after referring to the decision in Sheddon v. Patrick, added, "So, I apprehend, that this child was born illegitimate, according to the law of the country in which he was born, according to the condition of the mother of whom he was born, and according to the

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<sup>(</sup>a) 3 Swanst. 400.

<sup>(</sup>b) Not reported. Decided in Dom. Proc. Mar. 1821.

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state of the father, who was at the time a person unquestionably domiciled in England." Now, in this case, the lessor of the plaintiff is legitimate by the law of the country where he was born, and that law, not only considers him legitimate now, but as having been so at the time of his birth; his case, therefore, is the exact converse of the cases of Sheddon v. Patrick, and Strathmore v. Bowes: and it follows, that if the claim in either of those cases had been such as it is in the present, it would have been established by the House of Lords. Upon the whole, all the cases and authorities, in all the different branches of the English law, in which this question has come under discussion, seem to concur in laying down this principle: that the law of the country in which a man is born is to be referred to for the purpose of ascertaining his legitimacy; that if he is once legitimate there, and by that law, he is legitimate at all times, and in all places, and for all purposes; and carries with him into whatever country he visits, all the rights that appertain to legitimacy. Upon this principle, therefore, it is contended, that the lessor of the plaintiff in this case is entitled to recover.

Courtenay, contrá. The proposition on the other side, applied as it is to a question of freehold right, is absolutely monstrous. The principles and incidents of feudal tenure, out of which the whole law respecting freehold property emanates, all militate against it. The introduction of foreign laws, and the decisions of foreign courts in the administration of English laws, would be productive of incalculable inconveniences, and inextricable confusion. If a child, made legitimate by the Scotch law, by the subsequent marriage of his parents, could inherit lands in England, the result, according to the argument on the other side, must be, that he would inherit to the exclusion of children born in England, the offspring of a lawful intermediate English marriage. That argument cannot be maintained in any of its bearings. The right of

inheriting English lands, must be decided upon English principles, and upon English law; for, as Lord Coke says in his introduction to the report of Calvin's case (a), "questio juris, concerning freehold and inheritance in England, is only to be decided by the laws of this realm." If the law of England could allow the law of the country in which an individual is born, to decide the right of inheritance, innumerable innovations and inconsistencies would ensue. It is said by Pothier, in his Traite du Contrat de Marriage, part 5, s. 4, that by the canon law, if a man, during the life of his wife, marries another, and the second wife is in bona fide, that is, if she is ignorant of the impediment to her marriage, although her marriage is void, her children are legitimate. Suppose that law imported into this country; and suppose a man having daughters in this country, to go abroad where the canon law prevails, and there to enter into such a second marriage, and have a son; the result must be, that such son being legitimate in the country where he was born, would be legitimate in this country also, and would inherit the father's lands here, to the exclusion of the daughters. The mere statement of the proposition betrays its absurdity, and is at once an answer to it. Again—suppose an Englishman to marry several wives in a country where polygamy is allowed; each marriage would be valid there: but would each wife be entitled to dower here?-Or would the children of each be legitimate here? Or, suppose the Pope, by dispensation, to sanction an incestuous marriage; would the issue of that marriage be legitimate here? Or, suppose à converso, a marriage between first cousins, in a country where such a marriage is illegal and the issue of it would be illegitimate; would such issue be illegitimate and disqualified to inherit lands here, where such a marriage is legal? "Possessio fratris de fœdo simplici facit sororem esse hæredem," is a maxim peculiar to the law of England; but would the son of a second marriage, born

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(a) 7 Rep. 1, 4.

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in a country where that maxim is unknown, inherit lands in this country, to the exclusion of the sister of the whole blood? According to Voetius, lib. 25, tit. 7, s. 4, there are three modes of rendering legitimate one born illegitimate; namely, "per oblationem curies; per subsequens matrimonium; et per rescriptum principis." Why should any one of these modes be less influential than the others? Why, if a child rendered legitimate per subsequens matrimonium, may inherit lands in England, should not the. same privilege extend to one rendered legitimate per oblationem curiæ, or, per rescriptum principis?---Yet it would hardly be contended, even on the other side, that a child could inherit in the latter instances. The whole foundation of the argument for the lessor of the plaintiff, is the supposed necessity of recognising in this country the personal status of every person who comes into it. That can only be done when the status contended for is one consistent with the laws of this country. In the present case it cannot be done without letting in the civil law with all its absurdities and immoralities, to the subversion of all our own institutions, civil, religious, and political. The civil law has various gradations of illegitimacy; are they to be introduced into the law of England?—And if so, how are those gradations to be fixed, and where is the line to be drawn? Lord Coke, indeed, says, in Co. Litt., 244 a, "I read in Fleta, that there be three kinds of bastards, viz. manser, nothus, and spurius, which are described in two old verses :---

> 'Manseribus scortum, notho mæchus dedit ortum; Ut seges 6 spicâ, sic spurius est ab amicâ.'

"But," he adds, "we term them all by the name of bastards, that be born out of a lawful marriage." According to *Huber* and *Vinnius*, slavery is a personal status, which accompanies a man everywhere; but it has been more than once decided, that such a status cannot be

recognised in England. Somerset's case (a); Forbes v. Cockrane (b). If the comity of nations, which has been so much relied upon, could not be allowed to sanction a law prevailing in a British colony, how can it be allowed to sanction a law prevailing in an independent nation? Both are inconsistent with our existing laws; both are contrary to the spirit of our civil, religious, and political institutions: and both, therefore, are to be rejected as deep and dangerous innovations. The statute of Merton is of itself decisive to shew what is, and ever has been, the law of England on this subject. That was not, as it has been described, a mere refusal on the part of the parliament, to make a new law; but a declaration on the part of the parliament of what the then existing law was. It is this:-"To the king's writ of bastardy, whether one being born before matrimony may inherit in like manner as he that is been after matrimony, all the bishops answered, That they would not, nor could not answer to it, because it was directly against the common order of the church. And all the bishops instanted the lords, that they would consent that all such as were born afore matrimony should be legitimate, as well as they that be born within matrimony, as to the succession of inheritance, forasmuch as the church accepteth such for legitimate. And all the earls and barons with one voice answered, That they would not change the laws of the realm, which hitherto have been used and approved." Lord Coke, in his second Institute, p. 97, after mentioning the canon, which the prelates had thus endeavoured to convert into a law, says, "Of this canon, or constitution, Glanvill writeth thus (c): 'Orta est quæstio, si quis antequam pater matrem suam desponsaverat fuerit genitus vel natus, utrum talis

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filius sit legitimus hæres, cum postea matrem suam desponsaverat: et quidem licet secundum canones et leges Romanas talis filius sit legitimus hæres, tamen secundum

<sup>(</sup>a) Lofft, 1. Ho. St. Tr. vol. xx. 448. p. 1. (c) Glan. lib. 7, c. 15.

<sup>(</sup>b) Ante, vol. iii, 679. 2 B. & C.

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jus et consuetudinem regni nullo modo tanquam hæres, in hæreditate sustinetur, vel hæreditatem de jure regni petere potest.' And herewith do agree not only other ancient authors, but the constant opinion of the Judges, in all succession of ages ever since, of the ancient law of England." He then cites as his authorities, Bracton, lib. 5, 416; Fleta, lib. 6, c. 38; Fortescue, c. 39; and 11 Assize, p. 20. He then, p. 98, mentions the case of William the Conqueror, in terms clearly expressive of his opinion that it was perfectly immaterial whether the child was born, and his parents married, in a foreign country, or in England; for he says, "Some have written, that William the Conqueror being born out of matrimony, Robert, his reputed father, did after marry Arlot, his mother, and that thereby he had right of the civil and canon law: but that is contra legem Angliæ, as here it appeareth." Having previously observed, p. 97, "how dangerous it is to change an ancient maxim of the common law," he adds, p. 98, "Our common laws are aptly and properly called the laws of England, because they are appropriated to the kingdom of England, as most apt and fit for the government thereof, and have no dependency upon any foreign law whatsoever; no, not upon the civil or canon law, other than in cases allowed by the laws of England: therefore foreign precedents are not to be objected against us, because we are not subject to foreign laws." In Selden's Fleta, c. 9, s. 2, two causes are assigned for the opposition of our ancestors to the introduction of the civil law: "Altera est, juris Cæsarei apud majores tunc nostros (quâ regimen publicum illud omnino spectaret) aperta et publica improbatio: altera, juris Anglicani, quod commune vocitamus, ejusdemque principiorum, quâ gentis hujus genio ab intimâ antiquitate adaptata sunt, singularis æstimatio, atque inde, nec immeritó, in eodem adhæsio constans et sané pertinax." It is said, that legitimacy being a personal status. accompanying a man wherever he goes, and the lessor of the plaintiff being legitimate in his own country, he is

legitimate everywhere, and may inherit lands in this country; or, in other words, the whole of the argument on the other side may be reduced to the following syllogism: -"He who is legitimate in England, may inherit lands in England—legitimacy is a personal status which accompanies a man everywhere—therefore, he who is legitimate in Scotland, may inherit lands in England." This is plausible in appearance, but perfectly fallacious in fact. The major premise is false; therefore the conclusion cannot follow. It is not true that mere legitimacy according to the English law, will entitle a man to inherit lands in England; he must be not only legitimate, but he must be born in lawful wedlock; he must have a perfect capacity to inherit, which mere legitimacy does not confer: and, therefore, even if legitimacy is a personal status, which accompanies a man everywhere, non sequitur that a capacity to inherit lands is such a personal status. The right of inheritance is not a personal right, absolutely; it is only personal, sub modo; that is, subject to the restrictions and conditions of the feudal law. Voetius, as has been already mentioned, states three modes by which those who were by birth illegitimate, may be rendered legitimate; but in lib. 3, tit. "Digressio de feudis," s. 65, he savs. "Jure tamen feudali nulli alii quam legitimé nati, ad feudalem veniunt successionem, adeoque exclusi omnino naturales:" shewing that mere legitimacy, and a perfect capacity to inherit, are two distinct and independent qualities. The feudal law is local, and the right to inherit under it is personal only so far as that law designates the person who shall have that right. An absolute personal right accompanies the person everywhere, and gives him an absolute dominion over it, independent of the law; but the right to inherit land is local and conditional; a mere right to hold the land subject to the conditions of the local law. Feuds were not originally hereditary; inheritance under the feudal law was nothing more than a new admission to the fee. All the incidents of feudal tenure, as relief, pri-

Don v. Vardill. Doe v. Vardill. mer seisin, &c., shew that it is not a personal, but a mixed right; a right regulated, not by the personal status, but by the lex loci rei sitæ (a). There are many instances in which our own common law gives way to our own local jurisdictions; and wherever there is a conflict between the two, the lex loci prevails. By the common law the husband cannot be tenant by the curtesy, unless there has been issue born of the marriage; by the law of gavelkind, that is perfectly immaterial. By the common law the eldest son inherits all the land; but borough-English lands descend to the youngest son, and gavelkind lands to all the sons together. Many other instances might be cited, but the result of them all is this: that feudal inheritance is a mere matter of contract, falling, therefore, within the general rule, that every contract must be construed according to the law of the place where it Maddox, in his Formulare Anglicais to take effect. num, says, that feuds are made hereditary by the use of the words "hæredibus suis;" and "hæres," according to the definition of Lord Coke, is one, "ex justis nuptiis procreatus." No one who does not satisfy that description, which the lessor of the plaintiff certainly does not, can come within the contract; for the contract must be construed as between the king and the subject: and as all feudal grants were originally made by the king, and he has a direct interest by reason of his right in cases of escheat, it must be construed most in his favour. Court stopped him, and desired to hear

Tindal, in reply. The inconveniences and dangers attributed to the recognition of a foreign law in the present case, are the mere creatures of the imagination: they can never occur in fact. The extreme cases put, of a claim to dower by several wives married where polygamy exists, or of a claim to inheritance by their several sons; of a descent of land to a brother of the half-blood, or to the son

<sup>(</sup>a) See 2 Bl. Comm. c. 4, pp. 55, et seq.

of a second wife marrying in bona fide in the lifetime of the first; have really no application: because they are all cases in direct violation of the established laws of this country. All that is asked for the lessor of the plaintiff, is the recognition of the status of marriage and legitimacy, so far as they are received and recognised in every other state throughout Europe. It is admitted, that a marriage valid by the law of Scotland, is recognized as valid by the law of England: upon what sound principle can it be maintained that the consequence of such a marriage, namely, the legitimacy of the issue, shall not be recognised also? Legitimation per subsequens matrimonium, and, per rescriptum principis, have been represented as standing upon the same footing; whereas the effect of the latter is merely to release to the bastard a portion of that inheritance which was otherwise forfeited to the prince. Neither is the quotation from the "Digressio de feudis," of Voctius, any authority against the lessor of the plaintiff; it proves too much; for, the feudal law extended to Scotland, where persons not legitime nati, do inherit if made legitimate per subsequens matrimonium; therefore, it proves, that persons in the situation of the lessor of the plaintiff, are considered as legitime nati in Scotland. So, the passages eited from Glanvill, Fleta, and Bracton, and sanctioned by Lord Coke, apply exclusively to the law of England, and only show that a child born in England out of lawful wedlock, cannot be legitimated. It is agreed on both sides, that the person to inherit is the eldest son "ex" justis nuptiis procreatus;" the only question is, which is that son? The only argument is, that the laws of the country where the parents were domiciled, where the son was born, and where the marriage was solemnized, ought to decide that question. It is submitted, that the argument has not been refuted by any thing that has been advanced on the part of the defendant. Where the course of descent is governed by the local law, as in the cases put of gavelkind and borough-English lands, the foreign law,

DOE 0. VARDILL. DOR v. VARDILL. undoubtedly, would not be admissible, because it would go to alter that course of descent; but here the course of descent is admitted: and the foreign law would go no farther here than to point out who is the person satisfying the description of him according to that course of descent. The question in this case, is a question of fact, and ought to be decided by evidence of the law prevailing in the country where the facts that gave rise to the question occurred. Lolly's case (a); Dalrymple v. Dalrymple (b); Reeding v. Smith (c).

ABBOTT, C. J.—This case has been argued with great learning and ability on both sides, but the impression which I received upon the first reading of the special verdict, has not been altered by any thing which has been urged on the part of the lessor of the plaintiff. The short question is, who is the heir to lands in England? The rule that personal property does not follow the lex loci rei sitæ, but does follow the lex loci domicilii, has never yet been extended to real property; nor have I found in any of the decisions in Westminster Hall, any dictum that gives countenance to the opinion that it ought to be so extended. It has been said that there are two cases decided in the House of Lords, from which it may be inferred that such an opinion prevailed in that house; it is, therefore, a satisfaction to me to know that the present case comes before this Court in such a shape as to enable the lessor of the plaintiff to obtain the judgment of that high tribunal upon it, if he shall think fit, or be advised, so to do. There being no authority for saying that the inheritance of land follows the law of the domicile of its owner. I am of opinion that it must be understood to follow the law of the place where the land itself is situated. Land has a place and a situation: personal property has no locality; and I think it not correct to say, that in the distribution of personal property, the law of England gives way to the law of a

<sup>(</sup>a) Russ. & Ry. C. C. 237. (b) 2 Hagg. 106. (c) 2 Hagg. 385.

foreign country, but that it is part of the law of England that personal property shall follow the lex domicilii of its That being so, the question is, whether a person born out of England, can inherit land in England, who could not have inherited it if he had been born in Eng-That the descent of land in England follows the law of the place of its situation, is evidenced by the different customs prevailing in different counties and manors: is there, then, any authority for saying that the law of England, with regard to any lands in England, is to adopt the laws of a foreign state? We are not entirely without authority upon this point. We have the celebrated Statute of Merton, by which it appears that the bishops of that day sought the consent of parliament to the introduction of the very law for which the lessor of the plaintiff now contends; and were refused in language which has been always remembered and frequently repeated. It is said, that language should be considered as confined to marriages and births in England: but there were at that time foreign possessions belonging to the crown of England, and persons born there were not aliens: therefore, I see no reason for confining the language of the statute within the narrow compass suggested in argument. Having that authority before me, and finding nothing in our law books to confirm a contrary doctrine (and indeed in Brodie v. Barry (a), there is a dictum of the Master of the Rolls in favour of it), I think we should not be warranted in giving effect to the Scotch law legitimating the child by the subsequent marriage of the parents. It is not at all contrary to our law to hold that a foreign marriage, wherever, and in whatever manner solemnized, is valid, for the English law adopts the laws of all Christian countries as to marriage; but it by no means follows that we are to adopt all the consequences of such marriages, which are allowed in foreign countries: it is enough for us to adopt those consequences which follow marriages law-(a) 2 Ves. & Bea. 127.

Don v. Vardill. Doe v. Vardill. fully solemnized in our own country. Upon this short ground, I am of opinion that judgment should be given for the defendant.

BAYLEY, J.-I entirely agree with my Lord Chief Justice in his view of this case. I admit that the lex loci is to regulate the question of marriage; but whether, when we have established the validity of a marriage, all the consequences which attach upon the marriage in a foreign country, are also to be allowed to attach upon it here, is a totally different question, and I think must be answered in the negative. In my opinion the right to the inheritance of land depends upon the heritable character and quality of the land, and not upon any personal status of the individual. We have various descriptions of tenure in this country, and the question in each is, who is "hæres," according to the law of England? If the land is of gavelkind tenure, it descends to all the sons together; if it is in borough-English, it descends to the youngest son; each according to the descendible quality of the land, not the personal status of the individual. The common description of tenure, is the tenure in socage, and the question is, what is the descendible quality of land held in socage, and who is the hæres? It seems to me, that we need go no further than the statute of Merton for a clear and satisfactory answer to that question. That statute is entitled, "He is a bastard that is born before the marriage of his parents;" not restricting it to persons born in England; but applying it generally to all persons born out of wedlock, wherever born. Since that, there have been various acts of parliament passed for the purpose of giving to persons born out of England, the same right of inheritance which they would have had if born in England. Such are the statutes of 25 Edw. 3, st. 2; and 7 Ann. c. 5, s. 3. The object of the present ejectment is to give the lessor of the plaintiff, a person born out of England, a right which he could not have had if he had

been born in England. In stating a descent in a real action, it is not sufficient to say that the lands descended to "A. B., filio primo;" you must say, "filio primo et haredi." Now no person can describe himself as son and heir, whom the law of the land does not recognise as heir; and that, according to Lord Coke's definition, is one "ex justis nuptiis procreatus:" but the lessor of the plaintiff does not answer that description, therefore he cannot recover in this action.

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HOLROYD, J.—Much as the question in this case has been expanded in argument, it appears to me to lie within a very narrow compass. This is a case to be determined entirely upon the law of England. Dalrymple v. Dalrymple, is undoubtedly applicable to the present case, but in my opinion, it is an authority in favour of the defendant. Lord Stowell there said, that the question being entertained in an English Court, must be adjudicated according to the principles of English law. Upon a question of marriage, the law of the country where the marriage is solemnized is to prevail, and is to be adopted as a part of the law of England; and the same rule applies to the distribution of personal property, which the law of England regulates according to the lex domicilii of the intestate. But I know of no authority which says that the same rule applies to the inheritance of real property; and upon principle, it appears to me, that there the lex loci rei site, and that only, must apply. the law of England, I take it that legitamacy alone is not sufficient to make a person heir to lands in socage, but that it must be a legitimacy sub modo; such an heir must be, not only the eldest son, but he must be the eldest son born after marriage: and as the lessor of the plaintiff does not fill that character, I think he cannot maintain this action.

LITTLEDALE, J., concurred.

Judgment for the defendant.

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The statute 29 Car. 2, c. 7, " for the better observation of the Lord's-day," applies to private as well as public conduct; therefore, a horsedealer cannot maintain an action upon a private contract for the sale and warranty of a horse, if made on a Sunday.

FENNELL and another v. RIDLER.

ASSUMPSIT on the warranty of a horse. Plea, non assumpsit, and issue thereon. At the trial before Park, J., at the Warwickshire summer assizes, 1825, it appeared that the plaintiffs were horse-dealers, and the defendant an innkeeper, and that the contract was entered into, and the warranty given, on a Sunday, in the defendant's yard, the gates of which were closed, and in the presence of the parties, and their respective servants only. It was objected for the defendant, that the contract having been made on a Sunday, was within the statute 29 Car. 2, c. 7, and void; and that the action, therefore, was not maintainable: while for the plaintiff it was insisted, that the transaction having been conducted entirely in private, the case did not come within the operation of the act of parliament. The learned Judge directed the jury to find for the plaintiffs, and they did so. A rule nisi for a new trial having been obtained in Michaelmas term last,

Clarke shewed cause. This is not a case within the statute 29 Car. 2, c. 7. There was no labour performed, nor any public exercise of worldly business, within the meaning of the act. The only object of the act was to preserve public decency and the public observance of the sabbath, by preventing the open exercise of worldly callings on that day: and in that view of it, its spirit and object have not been violated in the present case. He cited Drury v. De la Fontaine (a), and Bloxsome v. Williams (b), as authorities, in point.

Adams, Serjt., with whom was Balguy, contrà. This is a case within the statute. The plaintiffs were in the exercise of their ordinary calling, and whether that was done pub-

<sup>(</sup>a) 1 Taunt. 156.

<sup>(</sup>b) Ante, vol. v. 82. 3 B. & C. 232.

licly or privately is quite immaterial. Both the cases cited are essentially different from the present. In the first, the statute was not violated by either of the parties, for neither of them was in the exercise of his ordinary business or worldly calling; here the plaintiffs were: in the second, the action was brought by the party who had not offended against the statute, and who was ignorant of the other party having done so; here the action is brought by the offending party.

FENNELL v. RIDLEB.

Cur. adv. vult.

## The judgment of the Court was this day delivered by

BAYLEY, J.—This case came before the Court (on that occasion consisting of my brothers Holroyd and Littledale, and myself), upon a motion for a new trial. It was an action upon the warranty of a horse; the plaintiffs were horse-dealers by business: and the horse was purchased, and the warranty given, upon a Sunday. The only question was, whether the transaction was within the statute 29 Car. 2, c. 7, so as to render the contract illegal and void, and thereby to bar the plaintiffs from maintaining the action. Now that is, "An Act for the better Observation of the Lord's-Day;" it directs, generally, that every person shall on every Lord's-day apply himself to the observation of the same by exercising himself in the duties of piety and true religion, publicly and privately: and then enacts, particularly, that no tradesman, artificer, . workman, labourer, or other person, shall do or exercise any worldly labour, business, or work of their ordinary calling on the Lord's-day, except works of necessity, or That the purchase of a horse by a horsedealer (as the plaintiffs in this case were proved to be), is an exercise of the business of his ordinary calling, no human being can doubt; and is there any thing either in the terms or the spirit of this act of parliament which can

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take such a purchase but of its operation? The spirit of the act is to advance the interests of religion, and to draw men's thoughts from their worldly concerns, and direct them to the offices of devotion and piety; it cannot, therefore, be construed according to its spirit, unless it is construed so as to check the career of worldly pursuits. Is there any thing in its terms inapplicable to the present case? It does not indeed apply expressly to all persons, but to such only as have some ordinary calling: and the introduction of the word "business," between the words " labour" and " work," might raise the question whether it included every description of the business of a man's ordinary calling, or whicher it was not confined to such as was manual, and so conducted as to be necessarily before But it is obvious that the most effectual the public eye. mode to promote public deceacy is by the regulation of private conduct, and there is nothing in the act to show that it was passed exclusively for the promotion of public decency, and not for the regulation of private conduct; and though I, for one, certainly expressed some doubts upon this point in the case of Bloasome v. Williams, I am now satisfied, upon more mature consideration, that it would be a narrow construction of the act, and a construction contrary to its spirit, to give it such a restriction. "Labour" may be private, and not meet the public eye, and may, therefore, not offend against public deceney; but it is nevertheless, labour, and equally interferes with the performance of a man's religious and spiritual duties: and the same may be said of "business," and of "work." Each may be public, and offend public decency by meeting the public eye: each may be private, and concealed, and so far less objectionable. But there is nothing in the position of the word "business," between the words "labour" and "work" which in our opinion can warrant our giving to that word any other than its general and ordinary meaning; and it seems to us, therefore, that every description of labour, business, or work, whether public, or

private, which is fairly part of the ordinary calling of a tradesman, artificer, workman, labourer, or other person, is within the prohibition of the statute. The introductory part of the statute expressly directs, that every person shall on every Lord's-day apply himself to the observation of the same, by exercising himself in the duties of piety and true religion, publicly and privately; it is, therefore, perfectly clear that its object was the regulation of private as well as public conduct. In Drury v. De la Fontaine, Lord C. J. Mansfield, after the Court had taken time for consideration, laid it down, that if any man, in the exercise of his ordinary calling, should make a contract on a Sunday, that contract would be void. The case then before him was one of a private contract for the purchase of a horse, and he decided that that case was not within the statute, because no one of the parties was in the exercise of the business of his ordinary calling at the time. His expression that the contract would be void, probably meant only that it would be void so far as to prevent the party who was privy to the circumstances rendering it illegal, from suing upon it in a court of law; but not so far as to prevent a right of action by an innocent party: and of that opinion was this Court in the case of Bloxsome v. Williams. That was the case of a private purchase of a horse, and the action was brought upon the warranty to recover back the price of the horse. The objection there was, that the purchase was made on a Sunday, and though I there expressed the doubts I have already mentioned, whether the statute applied to private contracts of purchase and sale, such as were not open and public breaches of the Sabbath, that was not the ground of the decision; for very distinct grounds were taken to shew that the statute could not apply, as the sale took place, substantially, not on the Sunday, but on the following Tuesday, when the horse was delivered, and the purchase-money was paid. It also appeared in that case, that the defendant was the only person who was in the exercise of his ordinary calling,

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and that the plaintiff was ignorant what his calling was; so that the defendant was the only person who had viclated the statute, and it would have been unjust to allow him to take advantage of his own wrong, to defeat the claim of the plaintiff, who was an innocent party. The latter case, therefore, is not at all opposed to the principle laid down in the former, and they both tend to support the objection in the present case. Upon the principle, therefore, that this statute is entitled to such a construction as will promote the ends for which it was passed, that it applies to private as well as to public conduct, and that the purchase of the plaintiffs', in this case, was within the mischief intended to be suppressed, we are of opinion, that they cannot maintain the present action, and that the rule for a new trial must be made absolute.

Rule absolute. .

Saturday. 6th May.

Fraudulently and covinously departing the realm before the awarding of an exigi facias, in order to defeat a plaintiff of the means of recovering a just debt, and to avoid an outlawry, does not preclude the defendant (on error) from reversing the outlawry, if he was, in fact,

## BRYAN v. WAGSTAFF (in error).

ERROR to reverse an outlawry in an action of assumpsit, brought against the plaintiff in error. Assignment of error, that before, and at the time of the awarding and issuing the writ of exigi facias, on which the outlawry was pronounced, the defendant below was in parts beyond the Plea to this assignment, that, before the awarding and issuing of the exigi facias, the plaintiff in error, of his fraud and covin, and in order to defeat the defendant in error of the means of recovering his just debt, and for the purpose of avoiding the said outlawry, when the same should be pronounced, voluntarily left the realm of England, and went into parts beyond the seas; and of such, his fraud and covin did voluntarily stay and remain in parts beyond

beyond sea, at the time of the exigent, and from thence until after the time of the outlawry.

the seas until after the awarding of the exigi facias, and the pronouncing of the outlawry. Issue on this plea, and verdict found for the defendant in error.



Campbell, in last term, obtained a rule nisi to reverse the outlawry non obstante veredicto upon the issue joined, on the ground, that as the defendant below was beyond seas at the time the exigent issued, he was not precluded from reversing the outlawry, even assuming that he had departed the realm before the awarding of the exigi facias, for the express purpose of defeating the defendant in error of the means of recovering his debt and of avoiding the outlawry; and he relied upon the authority of Hesse v. Wood (a), as a case in point.

Scarlett, and Chitty, shewed cause. The question is, whether a departure from the realm before the awarding of an exigi facias, in order to defeat a plaintiff of the means of recovering a just debt, and to avoid an outlawry, will preclude a defendant from reversing an outlawry (if pronounced), on the ground of his being beyond the seas at the time of the exigent, and from thence until after the time of the outlawry. It is submitted that, as the plaintiff in error wilfully and covenously went abroad, and stayed abroad, for the purpose of avoiding process of outlawry, he is concluded, although he was abroad at the time when the exigent issued. This is not like the case of a person, against whom process of outlawry has been awarded behind his back, and whilst he remains in ignorance of what is going on during his absence; in which case, perhaps, it would be unjust to preclude him from reversing the proceedings to outlawry: but where a person of his own wrong, wilfully and fraudulently goes abroad for the purpose of avoiding process, he forfeits all claim to indulgence afterwards. The cases upon this subject are not numerous, but those which are to be found in the books BRYAN
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are certainly not in favour of this application. With respect to Hesse v. Wood, on the authority of which this rule was granted, that case is distinguishable from this in a most material circumstance, because there it was only alleged, that the defendant went abroad in order to avoid the action; but here it is expressly found by the verdiet, that the defendant fraudulently and covenously went abroad, and remained beyond seas, until after the awarding of the exigi facias, and pronouncing of the outlawry. Without saying whether the C. P. was right or wrong in deciding Hesse v. Wood as it did, in considering whether an outlawry may be reversed for an error at common law, it is contended on principle, that where a party contumaciously goes abroad, and so remains for the purpose of avoiding the process of outlawry, he cannot afterwards have the judgment reversed. But independently of principle, the few authorities which are to be found upon the subject, go to shew that the object of this application ought not to be sanctioned by the Court. In Co. Litt., 259 b, it is said, "Albeit imprisonment be a good cause to reverse an outlawry, yet it must be by process of law in invitum, and not by consent or covin, for such imprisonment shall not avoid the outlawry. because, upon the matter, it is his own act." So, in Matthews v. Erbo (a), the Court refused to reverse, on motion, an outlawry against an alien merchant, living beyond sea; because, by this means, any person might contract debts, and then go beyond sea, and so he would be out of the reach of the law. In Ashley v. Stockwell (b), the only difficulty which the Court felt, in the case of a defendant who had gone abroad for lawful purposes, but had staid abroad to avoid actions, was, to determine from what moment his staying abroad to defeat justice should be taken to commence. In the case of Beauchamp v. Tomkins (c), there were laches in the plaintiff, and no

<sup>(</sup>a) Ld. Raym. 349.

<sup>(</sup>c) 3 Taunt. 141.

<sup>(</sup>b) Barnes, 324.

contumacy in the defendant. The case of Serocold v. Hampsey (a), is decisive to shew the important distinction observable between this case and Hesse v. Wood, because the Court there said, "If the fact were, that the plaintiff in error was within the realm during the process of outlawry, and went abroad by way of covin at the time of the exigent, that should be replied," which is strong to shew, that if replied, the Court would have been of opinion that it would have sustained the outlawry. being a common law objection, the Court is to look to the reason and principle of the rule in which it acts in similar It is an acknowledged principle of law, as well as of sound reason, that no man shall be permitted to take advantage of his own wrong. Shall it then be allowed, that a man may first evade the process of the law by knowingly and covenously staying away, and then after his bona fide creditor has suffered the delay and incurred the heavy expense incident to proceedings of this nature, come into Court and set aside all that has been If fraud be a ground for setting aside a judgment, obtained by a defendant, e converso it shall not defeat a judgment honestly obtained. Some very cogent authority must be produced on the other side, to take this case out of the plain rule of common sense and reason.

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Campbell, and Patteson, contrà. It is submitted, that the plaintiff in error is entitled on these pleadings to have the outlawry reversed, non obstante veredicto. As to the substantial justice of the case, there can be no great hardship imposed upon the plaintiff below by reversing this outlawry; for before the writ of error could be allowed the defendant in error must have given bail in the original action. [Bayley, J. There may be this objection, that in the intermediate time the plaintiff's witnesses may be dead, so that he might not be able to make out his original cause of action]. There is no suggestion of any thing of

<sup>(</sup>d) 12 East, 624, n. to Havelock v. Geddes.

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that kind here; both parties must now stand upon their strict legal rights. This is an application to the discretion of the Court, and the plaintiff in error is now in the same situation as if he had demurred to the defendant's plea. If the plea be good in law, then this rule must be discharged; but if it be insufficient, the plaintiff, de jure, is entitled to judgment. The question is, whether this plea is good or bad. Now, it is clearly bad, because at the time of the award of the exigent, the party outlawed was beyond seas. The general rule of law is, that if the party be abroad, at the time of the outlawry, he may reverse it by writ of error. If this be an exception from that general rule, the onus lies on the other side to shew that it is an exception; but they have failed in so doing. In Com. Dig. tit. Utlagary (C. 1), it is laid down, that "if a man at the time of his outlawry, was out of the realm, it will be error," Skin. 6. Now, if the Court should hold that a party by going abroad to avoid an outlawry in a personal action, is concluded, it will follow that a person who goes abroad to avoid a charge of felony, may be outlawed, and be liable to be attainted without trial; for the rule is the same with respect to criminal as to civil Most alarming consequences would therefore follow, if the Court were to sanction the proposition contended for on the other side. The only exception to this, would be that provided for by the Statute of Treasons, 5 and 6 Edw. 6, c. 11, s. 8, which enacts, that if a party outlawed for high treason, shall within one year yield himself to the Chief Justice of England for the time being, and offer to traverse the indictment, whereupon the outlawry shall be pronounced, he shall be allowed his traverse; and, if upon trial by the jury he shall be found not guilty, then he shall be acquitted of the outlawry, and discharged from the consequences thereof. No authority cited on the other side supports the position contended for. With respect to Matthews v. Erbo, that in fact is an authority in favour of the plaintiff in this case, because

there, although the Court refused to set aside the outlawry on motion, yet they said, that "the party might bring error and reverse it if he pleased." This is decisive to shew, that if he had brought a writ of error he would have succeeded. In Ashley v. Stockwell, the application was also by motion. The case of Serocold v. Hampsey, which is reported in three or four different places (a), has no direct application whatever to this; but as far as it goes, it is an authority in the plaintiff's favour. The position cited from Co. Litt. 229 b, applies to imprisonment at home, and not to the case where the party goes beyond seas; and it is only by analogy that any argument can be drawn from what is there laid down. There is a clear distinction between the case of a person who goes within the walls of a prison by his own contrivance, and that of a person who goes beyond seas. In the one case, the party is still within the realm: in the other, he is out of it. These, therefore, are the only authorities cited on the other side which have any reference to the subject, but they do not bear out the argument. Then what are the authorities in the plaintiff's favour? In 2 Roll. Abr. 804, it is said, "if a man goes over the sea of his good will, for his pleasure, or for his own private business, and not for the king's or that of the realm, and then the exigent is awarded against him, and he is outlawed, the outlawry is erroneous, as well as if he had been abroad for the business of the realm; for he being there, cannot take cognizance of the proclamations; but if, after the exigent pronounced, he departs voluntarily, &c., he shall never avoid the outlawry." This case comes expressly within what is here laid down. The case of Richardson v. Robinson (b), is an authority to the same effect. There the error assigned was, that the outlaw was beyond the seas when the writ of exigent issued, and thence continually until the outlawry pro-Upon traverse of the whole allegation and

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<sup>(</sup>a) 1 Wils. 3. 2 Stra. 1178. (b) 5 Taunt. 309. 1 Marsh. Salk. 496. 58.

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issue joined thereon, it was held to be sufficient to prove that the outlaw was in parts beyond the seas at the time the writ of exigent issued. In addition to the case of Hesse v. Wood, which is directly in point with this case, may be cited Graham v. Henry (a), where it was held, that if the outlaw did not go or continue abroad, for the purpose of avoiding process, the Court will, on motion, reverse the outlawry, and order the recognizance to be taken in the alternative, and not for the payment of the condemnation money absolutely. This shews, that even if the party had gone abroad for the express purpose of avoiding the outlawry, still the Court would on motion have set it aside on terms.

Cur. adv. vult.

BAYLEY, J., now delivered the judgment of the Court. After stating the nature of the application, the form of the pleadings, and the finding of the jury, he proceeded :-The question is, whether a departure from the realm before the awarding of an exigi facias, in order to defeat a plaintiff of the means of recovering a just debt, and to avoid an outlawry, will preclude a defendant from reversing that outlawry, on the ground of his being beyond the seas at the time of the exigent, and from thence until after the time of the outlawry; and upon consideration, we are of opinion, that it will not. An outlawry, even in a personal action, occasions a forfeiture of goods and chattels, (2 Rolle's Abr. 806 B, 40), and a disability to sue; and where the consequences are so penal, and the outlawry is prima facie erroneous, the Court ought to be cautious before it sanctions a new bar to its reversal. In 2 Rolle's Abr. 804, many cases of outlawry are put where there is an absence from the realm at the time of the outlawry; but none where the exigent is not awarded before the departure. One of the cases there is this:-" If

(a) 1 B. & A. 131.

a man goes over the sea of his good will, for his pleasure, or for his own private business, and not for the king's or that of the realm, and then the exigent is awarded against him for felony, and he is outlawed, the outlawry is erroneous, as well as if he had been abroad for the business of the realm, for he being there, cannot take cognizance of the proclamations; but if, after the exigent pronounced, he departs voluntarily, without any business of the king or the realm, he shall never avoid the outlawry, inasmuch a he was here at the time of the exigent pronounced, by which he had cognizance of the matter with which he was charged; for otherwise, every one might defeat the course of justice by his own act, and remain beyond sea till the witnesses who are to prove him guilty, are dead. this case, however, he may assign for error, that he was beyond sea, at the time of the pronouncing of the outlawry; for, if he were within the realm, after the exigent pronounced, and departed after, this shall come of the other side." This case, which is also in Cro. Jac. 464, by the name of Carter's case, makes the award of the exigent the terminus, after which a departure will be penal; but neither this, nor any other case, attributes any penal consequences to a departure before the exigent. In O'Kearney's case (a), in an outlawry for treason, the error assigned was, that he was out of England from December till November following, within which period the exigent was awarded, and the jury was charged to inquire, whether he was beyond sea or in England at the time of the award of the exigent; and it being proved, that he was abroad from the time of the award of the exigent, to the time of the outlawry, though he was not abroad the whole time he had alleged, the Court said, the time of the exigent was the substance, and the rest of the time immaterial, and the outlawry was reversed. In Serocold v. Hampsey, Mich. 16, Geo. 2, cited as a note to Havelock v. Geddes (b), the error assigned upon outlawry in a civil suit, was this, that the

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(a) Skin. 16.

<sup>(</sup>b) 12 East, 624.

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plaintiff in error was beyond sea, at the time of the promulgation of the exigent, and the court said, "it has been determined that as to the whole process of outlawry, it is not material in the assignment of error, to shew that the party was out of the realm, during the whole time; if he were abroad at the time of awarding the exigent, that is sufficient, for that is the substance. If the fact were, that he was within the realm during the process of outlawry [that is, as I apprehend, whilst the writs of capias were in progress], and went abroad by way of covin at the time of the exigent, that should be replied." All these cases speak of the award of the exigent, as the period upon which the right of reversal depends, and we are not aware of any case to the contrary; and in Hesse v. Wood (a), where a reversal upon motion was opposed, upon the ground that the defendant below went abroad to avoid the action, the Court said they had never heard, that either the going abroad, or the staying abroad, with a view to avoid process, was a reason why the defendant should not reverse an outlawry when he returned; and as a plaintiff may proceed by distress infinite, to compel an appearance, and is not obliged to make his election by proceeding by exigent and outlawry, we see no ground upon principle why it should. There was a passage cited in the argument, from Co. Litt. 259, importing that imprisonment, if by consent or covin, will be no ground for reversing an outlawry; but that does not appear to us to bear upon the question; for that must be taken to be an imprisonment, not merely before the award of the exigent, but during the time that the exigent is in operation and the process of demanding the appearance of the party is going on, and the non-appearance by fraud and covin, during that period, the party being within the realm at the time, and wilfully, and of his own act, neglecting to appear, when he is capable of doing so, is very different from the case of an absence beyond sea. A man who is in prison by fraud and covin, can hardly be said to be imprisoned, so as to

prevent his having his remedy by appearance. Upon the ground, therefore, that the plaintiff in error does not appear to have been within the realm after the exigi facias was awarded, and therefore that a departure before, though for the purpose of avoiding a suit, and delaying a creditor, has never yet been deemed a sufficient ground to prevent the reversing of an outlawry, we are of opinion that the rule should be made absolute. We are the more desirous of doing this, because we are not aware of any distinction between an outlawry in a civil action, and in the case of a felony; and, therefore, if we should decide in the present case, that absence at the time of the exigent would not avoid the outlawry, the same conclusion must be drawn upon application to reverse a judgment of outlawry, in a case of felony. In this case, we have the satisfaction of knowing, that if we are mistaken in our judgment, the objection is upon the record, and the party against whom we decide, will have his remedy in a Court of error.

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Rule absolute.

### The King v. Gudderidge and another.

ON shewing cause against a rule nisi for quashing a writ of certiorari, on the ground that it had been improvidently issued, the facts disclosed on affidavits were these: At the habitant of a last Michaelmas sessions for the county of Pembroke, an parish, cannot vote at sesappeal was heard against an order for the allowance of the sions, either accounts of the defendants, as churchwardens and over-termination of seers of the parish of Cosheston in the said county, when the justices assembled allowed the appeal, and quashed the counts of the order for the allowance of the accounts. An application was then made by the respondents for a case, for the opinion upon the pro-

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A justice of the peace who is a rated inupon the dean appeal against the acoverseers of his parish, or priety of granting a case for the opinion of the King's Bench. The KING
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of this Court, but it was refused by a majority of the justices then present. Some time afterwards, in the course of the same day, when five of the magistrates only remained, an application for a case was renewed, when three out of the five voted for it, and a case was accordingly granted, in opposition to the opinions of the other two. It appeared that one of the three justices who voted for the case, was a rated inhabitant of Cosheston, and when the judgment of the Court was taken on the merits of the appeal, he declined, on that ground, to take any part in the decision. Notwithstanding this, the respondents afterwards drew up the case without the concurrence of the appellant or his attorney; which case, and the order of sessions thereon, having been removed by certiorari into this Court,

Brodrick now shewed cause against the rule for quashing the writ. The question in this case depends upon the construction to be given to the stat. 16 Geo. 2, c. 18, s. 3, which prohibits justices of the peace from voting in the determination of any appeal to the quarter sessions, from any order, matter, or thing, relating to any parish, township, or place, where the justice is charged, taxed, or chargeable. Now, assuming that the justice, who was a rated inhabitant of Cosheston, had no right to vote upon the determination of the appeal, still it is submitted, upon the construction of this act, that the prohibition did not extend to his voting upon the question, whether a case should or should not be granted; because that was a matter of form, not involving the merits of the case, in the decision upon which he had taken no part. Besides, here the justice whose vote was objected to, was deciding against his own interest, and that rebuts the presumption of any undue motive, which is what is to be looked to, and is principally regarded by the statute. It is contended, therefore, that this gentleman was competent to vote upon the application for a case.

Campbell, and E. V. Williams, contrà. It is quite idle to say that the granting of a special case in this instance, was a more matter of form. The order of sessions was drawn up with reference to the case which had been granted; and therefore the case became part of the judgment of the Court. The whole was a judicial act, not divisible. The stat. 16 Geo. 2, c. 18, has been passed in vain, if such a proceeding as this can be tolerated. That statute was passed in furtherance of the common law, in order to prevent the abuses which had obtained, by reason of justices acting in cases where they were directly or indirectly interested. It is a clear principle of the common law, that no judge can vote in any case, either for or against his interest. In Great Charte v. Kennington (a), two justices made an order of removal, which was quashed at sessions, because one of the justices was an inhabitant of the parish from whence the pauper was removed. After argument upon the propriety of this decision, the Court held, that an order of removal being a judicial act, the party interested was tacitly excepted; and it was said that Lord Raymond, who lived in the parish of Abbot's Langley, went off the Bench, when one of their orders came before the Court. It was farther observed, that practice could not overturn so fundamental a rule of justice, as, that a party interested could not be a judge; and therefore they confirmed the order of sessions. It is said in a note to this case, that the 16 Geo. 2, c. 18, was passed to remedy this practice. So, in Rex v. Yarpole (b), it was held, that on an appeal to the sessions against an order of removal, those justices who are rated to the relief of the poor, in either of the contending parishes, cannot vote. Here both the principle of the common law, and the express language of the statute, excluded this gentleman

from acting in any way in the determination of the appeal, or granting the case; and therefore the certiorari must be

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ABBOTT, C. J.—We think the safer course is for us to say, that magistrates should not interfere in any way, in cases where they are directly or indirectly interested; and therefore, the rule for quashing the certiorari must be made absolute.

The other Judges concurred.

Rule absolute.

Monday, May 8th.

Where the Court granted a rule for a new trial, on the application of the defendant in a case where the plaintiff succeeded, and the latter applied to amend his declaration. but discontinued the action, not chusing to pay the costs of the former trial, as the condition of the amendment:-Held, that the defendant was not entitled to the costs of withstanding the plaintiff's discontinuance.

GRAY and another v. Cox and others.

HIS was an action of assumpsit, upon a contract for the sale of a quantity of copper sheathing. At the trial before Abbott, C. J., at the London sittings after Hilary term, 1824, the plaintiff had a verdict, and in Easter term, 1825 (a), the Court made a rule absolute for a new trial; but at that time the Court said nothing about the costs of the former trial. In Trinity term, 1825, the plaintiff applied for leave to amend the declaration; but the Court refused the application, unless the plaintiff consented to pay the costs of the former trial, and this the plaintiff afterwards declined doing, and discontinued the action. The defendant then took out a rule for the taxation of his costs, and the Master allowed him the costs of the former trial. On a former day, Leycester Adolphus obtained a rule nisi for the Master to review his taxation of costs, against which

campbell, now shewed cause. The plaintiffs having that trial, not withstanding the plaintiff's ants should be deprived of their costs of the first trial, the Court having ordered a new trial against the plaintiffs' verdict. The general principle is, that where a new trial is granted, and either party gives up the cause, the costs

(a) Ante, vol. vi. 200. 4 B. & C. 108.

of the former trial shall be allowed to the party in whose favour the judgment of the Court is given. ing elected to discontinue his action, the question is, whether the defendant is not entitled to the costs of that trial in which the plaintiff has failed. It is submitted, that according to all principles of equity and justice, and according to the express language of the statute 8 Eliz.. c. 8, the defendant is entitled to the costs of the former trial; for otherwise an unfair advantage would be gained by the plaintiff from his discontinuance, he having, by so doing, declared that he has no cause of action. plaintiff ought not to be allowed to acknowledge himself in the wrong, by bringing an action which he could not sustain, and then be suffered to saddle the defendant with the burden of the costs of that trial. The case of Jackson v. Hallam (a), is an authority to shew that the defendant is entitled to the costs of a former trial. the plaintiff having obtained a verdict, the Court, on the application of the defendant, granted a new trial, on the ground that the Judge had misdirected the jury in point of law, but the rule for a new trial was silent as to costs. The defendant, without going to trial, gave the plaintiff a cognovit, and the Court held that the defendant was liable to pay the costs of the trial. The case now at bar is much stronger than that cited; for the plaintiffs having discontinued, the defendants are entitled, as of right, by stat. 8 Eliz., c. 2, to the costs of the former trial.

# L. Adolphus, contrà, was stopped by the Court.

ABBOTT, C. J.—I am of opinion, that this rule ought to be made absolute. Supposing this case had gone to another trial, without any amendment of the record, and the defendants had succeeded, they would not have been entitled to the costs of the first trial; but if the plaintiffs had succeeded, they would have been entitled to the costs

(a) 2 B. & A. 317.

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GRAY V. Cox. of both trials. That being the practice which prevails in this Court, it seems to me to be difficult to discover any reason why the defendants should be in a better situation because the plaintiffs do not think proper to go to a second trial. The case of *Howarth* v. Samuel (a), is an authority decidedly against the defendants, because there it was held, that if, upon setting aside a verdict for the plaintiff the costs are directed to abide the event, and then the plaintiff discontinues the action, the defendant is not entitled to the costs of the trial.

BAYLEY, J.—I am of the same opinion. It is a settled rule, and has been held over and over again, that a party is never entitled to the costs of the trial in which he himself fails. That rule is to be collected from Trelawney v. Thomas (b), and Austen v. Gibbs (c). The case of Howarth v. Samuel is directly in point; and with respect to Jackson v. Hallam, that is not inconsistent with the rule, because that was decided on the ground that the plaintiff was ultimately entitled to the costs of that trial upon which he ultimately succeeded.

The other Judges concurred.

Rule absolute (d).

(a) 1 B. & A. 566.

(b) 1 H. Bl. 641.

(c) 8 T. R. 619.

(d) See 5 Burr. 2693. 3 T. R. 507. 6 T. R. 71. 6 T. R. 131.

1 East, 109. 1 H. B. 639. 6 T. R. 144. 10 East, 416. 1 Chit.

R. 19, 633. 1 Tidd, 508. Doug.

438, 695.

#### Marsh v. Horne.

ASSUMPSIT against a common carrier, for not safely carrying and delivering goods. Plea, non assumpsit. the trial, before Abbott, C. J., at the London adjourned sittings after Michaelmas term, 1823, a special verdict was found, which stated, in substance, the following facts:-

The defendant was, before and on the 21st January, 1823, the proprietor of a stage-coach, for the conveyance accordingly, is of passengers and goods for hire, from London to Bath. Before that day, and while he was proprietor of the coach, parcel worth the defendant published an advertisement, and gave public notice, that he would not hold himself accountable for any parcel above the value of 51., if lost, or damaged, unless his notice, and the same should be entered as such, and paid for accordingly, when delivered to him. On the 21st January, at two different times of the day, the plaintiff delivered to the defendant, two boxes, containing silk goods of the at the time of value of 2261. 3s. 8d., to be conveyed by the defendant, ance he knew by his coach, from London to Bath, and there to be deli-that the value vered to the plaintiff; and until so delivered, to be kept exceeded 51. by the defendant, for a certain reasonable reward, to be therefore paid by the plaintiff to the defendant; which boxes the defendant accepted from the plaintiff, for those purposes. The plaintiff paid the defendant twopence for each of the boxes, for the booking. At the time when the boxes were so delivered to, and accepted by, the defendant, the plaintiff knew that the defendant had published such advertisement, and given such public notice; and the defendant knew that each of the boxes, with its contents. was of a value exceeding 5h; but neither of them was entered by the plaintiff as being of such value, nor paid for accordingly: nor was any such entry or payment required by the defendant. The defendant did not safely convey or deliver the boxes; but they, and their contents,

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A common carrier, who At has given public notice that he will not be accountable for the loss of any parcel above the value of 51., unless entered and paid for not liable for the loss of a more than 51., delivered to him by a person informed of accepted by him, without any demand for the carriage, although such acceptof the parcel

1826. Marsh v. Horne. were, during the progress of the coach, on its journey to Bath, lost, or stolen from the hind boot of the coach, wherein they had been placed by the defendant, but without their being exposed to any greater than ordinary risk.

R. Bayly, for the plaintiff. Originally, and by the common law, carriers were liable for all losses, except those occasioned by the act of God, or the king's enemies. Latterly, notices, limiting the liability of carriers, have been introduced by themselves, and have been favoured by courts of law, for the purpose of protecting them from frauds by the owners of goods. These notices, however, have at length been perverted by the carriers, into shields of protection against the consequences of their own fraud or negligence. Where a carrier has been guilty of gross negligence, it is clear that such a notice will not protect him, Beck v. Evans (a); and the opinion there expressed by Le Blanc, J., that the notice would not apply to cases where the goods were of a large bulk, and of a known quality, so that their value must be apparent, seems to have been acted upon by Lord Ellenborough, in Wilson v. Freeman (b). Where the price for the carriage of the goods is to be paid on the delivery of them to the carrier, the notice may apply; but where it is to be paid on the delivery of the goods to the consignee, it cannot. The contract in this case was of the latter description, and is so found by the special verdict. The notice, therefore, cannot apply to this case, because the terms of it are, that the carrier will not be accountable for the goods, unless they are entered, and paid for, accordingly; and here nothing was to be paid for the goods until the end of the journey. The carrier, in this case, was to have a reasonable reward. Was that a fixed or an uncertain sum? it was a fixed sum, he was bound to carry and deliver safely for that sum. If it was an uncertain sum, he was

<sup>(</sup>a) 16 East, 244.

<sup>(</sup>b) 3 Camp. 527.

to have a fair remuneration, according to the value of the goods. In either case he was bound to carry and deliver safely. By accepting the goods, the carrier undertook to carry them from London to Bath, and to deliver them at Bath; and as he knew, at the time of his acceptance, that the goods were worth more than 5l., and did not require to be paid for them according to their value, he waived the benefit of his notice. The only principle upon which he was to have a reasonable reward, was his undertaking safely to carry and deliver the goods; and he cannot now be permitted to say, that though he did undertake to carry them, he did not undertake to deliver them.

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Curwood, contrà. The original common law liability of the carrier has been truly described; but it is now clearly settled, that he may limit his liability by public notice: and in this case he has done so. He has, therefore, made a special contract; and if that contract has been rescinded, it must have been either by words or acts. Here there are clearly no words sufficient to rescind the contract; and as to acts, the acceptance of the goods under the circumstances stated in the special verdict, was not an act in any degree inconsistent with the notice. The carrier does not, by his notice, refuse to carry parcels of greater value than 51., but only to insure, or be accountable for them; therefore, his knowing, at the time he accepts it, that a parcel is worth more than 51., is no waiver of the notice: and, indeed, unless the real value is stated at the time, no contract at all can be made consistent with the notice. But the plaintiff is bound by his knowledge of the terms of the notice. In Gibbon v. Paynton (a), it was said, by Yates, J., "If the plaintiff was apprised of the defendant's advertisement, that might be equivalent to personal communication of the carrier's refusal to be answerable for money not notified to him:" and in Tyly v. Morrice (b),

(a) 4 Burr. 2298.

(b) Carth. 485. See Buller's N. P., 371.

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MARSH v. Horne. where 400*l*., sealed up in a bag, was delivered to a carrier, and he was told that it contained only 200*l*., he was held answerable for the 200*l*. only, because his reward was commensurate with that sum only.

The Court took time to consider of their judgment, which was now delivered by

ABBOTT, C. J., who, after stating the nature of the action, and the facts detailed in the special verdict, thus proceeded. Upon these facts, it was contended, on the part of the plaintiff, that the defendant, knowing that the value of the goods exceeded 51., was bound to demand the payment of the insurance; and having omitted to do so, must be considered as having waived the benefit of his notice; that it would be an inconsistency to allow a carrier to accept goods for the purpose of carriage, and yet to say, that he was not responsible if he did not carry them: and that, as the price of the carriage in this case was to be paid only on the delivery of the goods, the defendant might then have received a reasonable remuneration for his labour and risk. We are, however, of opinion, that there is no such inconsistency as that suggested. A carrier may undertake to put goods in a course for conveyance and delivery, and at the same time declare that he will not be accountable for their loss. The argument set up on the part of the plaintiff would entirely defeat the notices given by carriers, which have now obtained in practice for many years, and have been supported by numerous deci-Looking at the notice given in this case, we think the defendant could not, upon the delivery of the goods, have maintained an action for any sum beyond the reasonable charge for carriage, exclusive of his liablity for a loss upon the increased value. With respect to the first point raised in argument, it may with equal truth be said, that the plaintiff, who was aware of the defendant's notice.

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and elected not to comply with its conditions, constituted himself his own insurer, as that the defendant, who knew that the value of the goods exceeded 51., and did not require payment accordingly, nevertheless undertook to be responsible for the goods, and to indemnify the plaintiff to their full amount. In this respect the present case is essentially different from that of Wilson v. Freeman (a), cited in argument, because, there the carrier not only knew that the goods were of more than ordinary value, and liable to injury, and was informed that he might charge what he pleased, but he, in fact, declared his intention to make a more than ordinary charge, for the carriage of them. It is, however, desirable to notice two cases, which are authorities in favour of our decision in the present. Harris v. Packwood (b). The goods in that case were silk, and the carrier had published an advertisement, stating that his charge for the carriage of silk goods was 9s. 4d. per cwt., though for ordinary goods he charged only 6s. per cwt. His advertisement was similar to that published by the present defendant, and he was held to be protected It did not, indeed, distinctly appear in that case, that the carrier knew, at the time the parcel was delivered to him, that it contained silk, but the fact can scarcely be doubted; because the parcel was to be delivered at Coventry, where the plaintiff lived, and the defendant had sent him a copy of his notice there. It was also held there. that it did not lay on the defendant to prove, affirmatively. that he had used reasonable care; but that it was incumbent on the plaintiff to prove that the defendant had been guilty of negligence. The second case is that of Levi v. Waterhouse (c). There it was proved, that a servant of the carrier, to whom the parcel was delivered, knew that its value exceeded 51.; but it was held, by Gibbs, C. J., that the mere knowledge of the value did not take the case out of the general rule; and his opinion was confirmed, after

<sup>(</sup>a) 3 Camp. 527.

<sup>(</sup>c) 1 Price, 280.

<sup>(</sup>b) 3 Taunt. 264.

1826. Marsh HORNE. argument, and deliberation, by the court of Exchequer. For these reasons, and upon these authorities, we are of opinion that the defendant is entitled to judgment.

Judgment for the defendant.

Monday, May 8th.

Where the commons by petition prayed the king, that a charter made, and the liberties thereby granted, to a corporation, might be confirmed in parliament; and the king anwered, that it was assented and agreed in parliament. that the liberties in the petition mentioned, should be confirmed under the king's great seal—and the charter was confirmed by the king accordingly :--Held, that this proceeding in parliament of parliament, so as to prevent the king

### The King v. Haythorne.

THIS was a rule calling upon the defendant to shew cause why an information, in the nature of a quo warranto, should not be filed against him, to shew by what authority he claimed to be mayor of the city and county of of Bristol. The affidavits sworn on the part of the relator disclosed the following facts:—The city of Bristol is an ancient city, having divers liberties and privileges, but is not a corporation by prescription. Edw. 1, by charter, dated Westminster, 28th March, 28th of his reign, confirmed former charters granted by Hen. 3, and further granted to the burgesses of Bristol, that they and their successors, burgesses of the same town, as often as, and whensoever, they should chuse their mayor, time of war only excepted, should present him to the constable of the castle of the town, to be admitted, and not at the Exchequer. That charter was accepted by the burgesses, and was confirmed by Edw. 2, 15th of his reign, Edw. 3, 5th of his reign. By another charter, dated Woodstock, 8th August, 47 Edw. 3, reciting, that by charters, as well of his predecessors, kings of England, was not an act which he had confirmed, as of his own, divers liberties and acquittances had been granted to the burgesses of the

from granting to the corporation a new charter, varying the mode of election of their officers provided by the former charter.

Where a charter released to a corporation the power of removing their members, which a former charter had reserved to the crown, and released also all causes of complaint against the corporation for non-compliance with the terms of the former charter: -Held, that the second charter could not be taken to have been founded upon the first, and that the first charter being void, would not therefore avoid the second.

town of Bristol, their heirs and successors, for ever; and that at the petition of the mayor and commonalty, also recited, his majesty granted, and by his said charter confirmed, for himself and his heirs, to the burgesses, their heirs and successors, for ever, that the city of Bristol, with its suburbs and precincts of the same, according to its metes and bounds, as they are limited, should be in future for ever separated, and in all respects exempted from the counties of Gloucester and Somerset, both by land and by water, and should be a county of itself, called the county of Bristol; and that the burgesses, their heirs and successors, for ever, should have, within the town and suburbs, and their precincts, by metes and bounds, as they were limited, the liberties and acquittances thereunder written, and should fully use and enjoy them; i. e., among others, that every mayor of the town of Bristol, as soon as he should be elected, should be the escheator of his majesty; and also that the burgesses, their heirs and successors, for ever, should have all other the liberties and acquittances then before granted to them, as well by his majesty's predecessors as by himself, and also all other their customs and profits thence arising. This charter contained no directions as to the mode of electing the By letters patent, dated Westminster, 1st September, 47 Edw. 3, reciting the last mentioned charter, that king appointed and commanded a perambulation between the county of Bristol and its precincts, as well by land as by water, and the counties of Gloucester and Somerset. A perambulation of the county of Bristol, with its metes and bounds, was had, and a return thereof made into Chancery, and the perambulation exemplified. an act of 47 Edw. 3, the said charter, and all and singular the grants, liberties, acquittances, and things therein specified and contained, and the perambulation exemplified by the letters patent, were ratified and confirmed to the burgesses of Bristol and their successors; which act has never been repealed, but still continues in

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force. At the time of the granting of the charter, and the passing of the act, one of the liberties, privileges, and customs of the town of Bristol, was (according to the deponent's information and belief), that the burgesses should every year chuse from among themselves, a burgess, to be Before the granting and confirmation of the charter, there was no common council distinct from the By charter, dated 5th July, 34 Hen. 8, burgesses. Bristol was made a city. In 4 Hen. 6, the charter and former act of parliament were recognised by parliament. In 25 Car. 2, certain of the members of the corporation of Bristol attempted to surrender to his majesty the rights and privileges of Bristol, but such surrender was never enrolled of record. By letters patent, dated 2d June, 36 Car. 2, that king granted that the citizens and inhabitants of Bristol should be a body politic and corporate, by the name of the mayor, burgesses, and commonalty of the city of Bristol. That charter vested the right of electing the mayor and sheriffs in the common council; and reserved to the king a power of removing the mayor, recorder, or any of the aldermen, or the sheriffs, or any one or more of the common council, or the common clerk, steward, or coroness of the city. By a proclamation of 4 Jac. 2, reciting that his majesty was resolved to restore all his cities to the same state as they were in before any surrender of their charters, it was declared, that corporations whose deeds of surrender were not enrolled, or judgment entered against them, and the mayor, bailiffs, &c., and the members respectively, should, upon the publication thereof, take upon themselves to act and proceed as a body politic. That proclamation was acted upon by the mayor, burgesses, and commonalty of Bristol, and the surrender cancelled by the king. The common council of the city of Bristol, acted upon the charter of 36 Car. 2, or some subsequent charter, which, if there was any such, the deponent, a burgess, believed to be void in this respect. The deponent received no notice at any time, before, or on the

29th September, 1825, to attend on that or any other previous day, for the election of a mayor, for the year then ensuing; and he believed that no such notice was given to any of the burgesses, for such purpose, except to certain select bodies of the corporation, consisting of the mayor, aldermen, and common council, amounting together to about 43 persons. At a meeting of those select bodies, the defendant was elected mayor, and all burgesses, except those select bodies and their officers, were excluded from being present, or voting at the election.

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The affidavits in answer to the rule were made by the chamberlain of the city and county of Bristol, who had the custody of the charters and other documents belonging to the corporation, and by the deputy keeper of the records in the Tower, to whom those charters and documents had been delivered for examination; and they disclosed the following facts. By charter of 9th Anne, that queen granted to the mayor, burgesses, and commonalty of the city of Bristol, among other things, that there should be out of the better and more discreet citizens 40 persons besides the mayor, who should be the common council, and that as often as it should happen that any mayor, recorder, sheriffs, common councilmen, common clerk, steward of the court of the sheriffs of the county of Bristol, or coroners of the city, should die, or be removed, or go out of office, or that any election of those officers, or of any one or more of the same should thereafter be vacated or rendered ineffectual by incapacity, or refusal, or any other means, that then, and in every such case, another fit person should be duly elected from time to time by the common council, or by the greater part of the same, into those offices respectively, and should be sworn by the mayor, or by such other person, at such time and in such place and manner, as had been used and accustomed in the said city in that respect for the space of forty years then last past. By The King v.

another clause of that charter, the queen released to the mayor, burgesses, and commonalty of the city of Bristol, and their successors, all power and authority reserved to King Charles the Second, by his letters patent, dated 2d June, 36th of his reign, concerning the signifying the royal approbation of the mayor, &c., and all power reserved of removing the mayor and other officers, or any of the common council. This charter was accepted by the mayor, burgesses, and commonalty of the city of Bristol, and has ever since been acted upon, and the uniform and constant practice and usage has been, that on, &c., in every year, the mayor, aldermen, sheriffs, and common council, meet in the Guildhall, to elect the mayor and sheriffs for the year ensuing, when the mayor for the time being proposes one of the common council to be the new mayor; the aldermen and sheriffs propose another of the common council; and the residue of the common council propose a third; and one of the three so proposed, who has the greatest number of voices of the whole of the common council, is declared elected. From the year 1598, the books of the corporation contain a regular series of entries of the elections of the mayor for each year, from which it appears that during the whole of that period the elections were made by the common council in the mode above Before the commencement of that series, there are some entries of elections of mayors in the reigns of Henry 6th and Henry 7th, by which it appears that all the elections of mayors were by the common council exclusively; and there is no entry in any of the books, papers, or documents of the corporation, of any elections of mayors by any other persons than the common council, nor have the burgesses and commonalty ever exercised, or claimed to exercise, any right of interference in the elections of mayors. According to the opinion and belief of the deputy keeper of the records in the Tower, founded upon the examination of the books, documents and papers delivered to him by the chamberlain of Bristol, it ap-

peared that the corporation of Bristol was a corporation by prescription, and that before the charter of 47th Edward 3, there was a mayor and common council in The earliest entry of an election of HAYTHORNE. the corporation. mayor in the books of the corporation is in the reign of Henry 6th. One of the entries of the election of mayor in the reign of Henry 6th, states, that "Robert Sturmy, that time mayor, J. B., J. S., &c., with all the notable persons of the whole common council of the town of Bristol, assembled in their council house, and by their right, discreet, and sad advisements chose R. H. to be mayor during the next year coming. Which mayor, and all the notable persons aforesaid, after the said election done, enacted and established the ordinances that follow," The petition exhibited in parliament by the commons to the king, in the 47th Edward 3, was as follows. " Please our lord the king of his good and especial grace, to grant that your gracious charter made to your lieges burgesses of your town of Bristol, containing that the said town with the suburbs and precincts thereof shall be a county by itself, and the franchises by you granted to your said burgesses by the same, shall be by you ratified and confirmed in this present parliament, together with the perambulation thereof made by your commission, and returned into your Chancery, of the said precincts and of the bounds thereof, and the commons pray that this bill be confirmed in the present parliament." The answer was as follows. "It is assented and agreed in parliament, that the charter, franchise, and perambulation whereof this bill makes mention, be ratified, approved, and confirmed to the free burgesses of the town of Bristol, and to their heirs and successors, under the king's great seal." After this petition and answer, Edward 3, by an inspeximus charter, reciting the former charter, which separated the town of Bristol, with the suburbs and precincts, from the counties of Gloucester and Somerset, and the letters patent which exemplified the perambulation of the metes and bounds of the county of Bristol, re-

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turned into Chancery; by the assent and agreement of the prelates, nobles, great men and commonalty in parliament, ratified, approved, and confirmed to the burgesses of Bristol, their heirs and successors, for ever, as well the said recited charters, and all and singular the grants, liberties, acquittances, and things contained therein, as the said perambulation exemplified as aforesaid. grant is in these words. "We, by the assent and agreement of the prelates, nobles, great men, and commonalty, being in our parliament called together at Westminster, on the morrow of Saint Edmund last past, do, for us and our heirs, by virtue of these presents, ratify, approve, and confirm for ever, to the said burgesses of Bristol, and to their heirs and successors, as well our said charter and all and singular the grants, liberties and acquittances, and all other things contained and specified in the same charter, as the said perambulation exemplified by our letters patent aforesaid, concerning the metes and divisions so made between the aforesaid counties of Gloucester and Somerset. and the said county of Bristol, or the borders and bounds, and those letters, and all and singular the things contained in those letters, as our charter and letters aforesaid more fully testify. In witness whereof we have caused these our letters to be made patent. Witness ourselves at Westminster, on the 20th day of December, in the 47th year of our reign."

Copley, A. G., Scarlett, W. E. Taunton, Ludlow, and G. R. Cross, shewed cause. This rule must be discharged. It was obtained on two grounds:—first, that the defendant having been elected pursuant to the void charter of 35 Charles 2, has no right to retain his office; and second, that the charter of 47 Edward 3, conferring the right of election on the mayor and commonalty, having been confirmed by parliament, could not be altered by any subsequent charter, so as to transfer the right to the common council, as a select body. The first objection does not require either argument or authorities to refute it; it is

completely answered by the affidavits filed on the part of the defendant; which clearly shew that the election took place, not under the provisions of the charter of 36 Charles 2, but under the provisions of the charter of 9 Anne, and conformably to the usuage and practice which has prevailed in the corporation from the year 1598, down to the present time. With respect to the second objection, it is assumed, that prior to the charter of 47 Edward 3, the right of election was in the commonalty; but the affidavits before the Court furnish no proof of that fact. It rests entirely upon surmise and assertion. But even if there were any documents in existence apparently authorising that assumption, still the long and undeviating usage and practice which have been adopted in the regulation of the election of the corporate officers, would be amply sufficient to countervail any inference arising from early records to the contrary. The effect attempted to be given to the charter of 47 Edward 3, and the act of parliament relating thereto, is not warranted by the instruments themselves. That charter is perfectly silent as to the mode of electing the mayor, and other corporate officers; and, therefore, throws no light upon the present question: but even if this were not so, the act of parliament does not go to confirm that charter, with respect to any of the rights of election. The town of Bristol having been constituted a county, and a commission having been issued to ascertain its metes and bounds, the act of parliament was passed to confirm those metes and bounds, and to enable the crown to grant another charter under the great seal, confirming the former charter, and the new jurisdiction and privileges proposed to be given to the town upon its becoming a county. The object of the act, therefore, was, not to diminish or limit the prerogative of the crown, but to enable the king to confirm under his great seal the more extended privileges

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of the corporation. The present case is perfectly distin-

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less be relied on by the other side. The point there decided was, that the constitution of a corporation, as settled by an act of parliament, cannot be varied by the acceptance of a subsequent charter, inconsistent with it. In that case, disputes having arisen as to the rights of election in the corporation of Northampton; in order to put an end to them, an act of parliament was passed in the reign of Henry 8, reciting those disputes, and providing a particular mode of election in future. In that case, therefore, the right of election was expressly created and defined by an act of parliament, and could only be altered by the same authority. The present case stands upon a totally different footing, because the act of parliament leaves the prerogative of the crown untouched, and was passed exclusively for the purpose of converting the town of Bristol into a county. With respect to the charter 36 Charles 2; even assuming it to be void in the first instance, in consequence of the supposed surrender on which it was founded not having been enrolled; still, it was confirmed in the fullest possible manner by the charter of 9 Anne, which clearly had the effect of setting it up, so far as it was not inconsistent with the latter charter. Upon these grounds, it is submitted that the Court will not interfere to disturb the mode of election which has prevailed so long in this important corporation.

Wilde, Serjt., Merewether, Tindal, and Bompas, contrà. The affidavits do not furnish an answer to this application. By the charter of 28 Edward 1, the burgesses are directed, so often as they elect a mayor, to present him to the constable of the castle: from which it seems clear, that at that time the election of mayor was by the burgesses at large, and not by any select body. From that time down to the 47 Edward 3, it is not contended that any alteration took place in the mode of election; but by charter of the latter date, the city of Bristol was constituted a county of itself. That charter, and all the then existing rights and privileges of the corporation, were after-

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wards confirmed by that which the relators contend was. properly speaking, an act of parliament; but which the defendant insists, was a mere personal act of the crown, unconnected with the legislature. The prayer of the petition was, that the king would confirm the charter "in that present parliament:" the answer of the king was, that it was assented and agreed, "in parliament," that the charter should be confirmed: and it was afterwards in fact confirmed "by the assent and agreement of the prelates, nobles, great men, and commonalty, being in our parliament called together." The form of this proceeding was certainly somewhat different from that of modern statutes; but looking at the whole of it together, it was clearly an act of the legislature jointly with the king, or, in other words, an act of the king in parliament: and, consequently, the constitution of the corporation having been then settled by an act of parliament, could not afterwards be altered by the royal prerogative alone, or by any authority less than an act of parliament. For this proposition, Rex v. Miller (a), is an express and decisive authority. But, secondly, even if this confirmation of the charter of 47 Edward 3, did not amount to an act of parliament, still there is no subsequent valid charter, authorising that mode of electing the mayor, which has of late years been adopted. The charters of 36 Charles 2, and 9 Anne, are relied upon by the defendant; but neither of them can be supported as a valid charter. The former being founded on a void surrender, was for that reason itself void also; and, consequently, could have no operation whatever upon the customs or constitution of the corporation. The latter was granted upon the assumption that the former was valid and binding, for it is almost exclusively a charter of confirmation; and as the first charter was void, the queen was deceived in that respect; and the second charter being granted under the influence of that deception, was void also. But, thirdly, even if the charter of 9 Anne is valid, it will nevertheless not

(a) 6 T. R. 268.

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authorise the mode of election adopted in the case of the present defendant. By that charter, the election is to be "at such times, and in such place and manner as had been used and accustomed in the said city in that respect, for the space of 40 years then last past." By the charter of 36 Charles 2, the election was to be by the common council; but even if that was acted upon down to the granting of the charter of 9 Anne, still the language of the latter would not be satisfied, because the period of 40 years there limited, would extend back beyond the period of the 36 It is attempted to meet this difficulty by pro-Charles 2. ducing the entries in the corporation books in the reign of Henry 6, which describe the election of mayor to have been by the notable men of the common council assembled in the council house; but they only shew the designation of "common council" to have been then known and used: they by no means go on to shew that any common council was then in existence, as a select and separate body from the commonalty at large. Without, however, going further into the merits of the case, the affidavits on both sides clearly shew, that there are questions of great doubt and nicety connected with, and arising out of, the constitution and customs of this corporation; and, therefore, the Court will, according to their constant practice, make this rule absolute, in order that those questions may be tried before the proper tribunal, where the whole case may undergo a fuller and more mature deliberation than it can receive on a motion like the present.

ABBOTT, C. J.—I am of opinion that this rule must be discharged. It is not now a controverted fact, that as far at least as man's memory goes, the election of the mayor of the city of *Bristol* has been conformable to the mode in which the defendant has been elected. It is not distinctly denied, that the same mode of election has prevailed ever since the grant of the charter of 9 Anne; and no instance, certainly, has been shewn of a different mode of

election since that period. But it is said, that an election under the statute of 9 Anne, cannot be good for two reasons; first, because that charter must be taken to be different from that of 47 Edward 3, and that the parliamentary confirmation of that king's charter had the effect of preventing the crown from granting any subsequent charter, varying the provisions which that charter contained, or the liberties previously enjoyed by the city:-and second, because the charter of 9'Anne is in itself void, on the supposition that the queen was deceived in making her grant, by reason of the reference made in it to the previous charter of 36 Charles 2, which was also void, as being founded upon a surrender which was invalid for want of enrolment. Now I will consider each of these grounds separately. The proceedings which took place in the 47th year of Edward 3, we have from the parliament roll, and the other documents before us. point of date is the charter of 8th August, 47 Edward 3, by which it appears that monarch granted to the corporation of Bristol various liberties and privileges, confirming the former liberties and privileges of the town, and granting also, that Bristol should from thenceforth be a county of itself, to be comprised within certain metes and bounds. In the following month the king issued a commission in order to have a perambulation to ascertain the metes and bounds which were to be the limits of the county of the city. After that commission had issued, and a return had been made thereto, a proceeding took place in parliament, which, it is said, is itself an act of parliament, confirmatory of all that had been previously done by the king in the months of August and September; and the effect of which was, to prevent the king from varying the customs, liberties, and privileges confirmed and granted by the charter, except by another act of parliament. Let us inquire whether such an effect can properly be given to this proceeding in parliament. It begins, as many acts of parliament of ancient date do, in the form of a petition from

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the commons to the king, followed by an answer from the king. The commons say, "may it please our lord the king, of his good and special grace, to grant that your gracious charter made to your lieges, burgesses of the town of Bristol, shall be by you ratified and confirmed in this present parliament, together with the perambulation. And the commons pray that this bill be confirmed in this present parliament." To this petition, the king answers thus:--" It is assented and agreed in parliament, that the charter, franchises, and perambulation, whereof this bill makes mention, be ratified, approved, and confirmed to the burgesses of the town of Bristol, their heirs and successors." Stopping here, there would be great reason for contending that this confirmation, on the petition of the commons, of what had been previously done by the crown in the month of August, was in itself an act of parliament; but it does not stop here, for the king goes on to say, in express terms, that this shall be done, "under the king's great seal:" clearly referring to some confirmation which was to be made by some subsequent act of the king himself. Accordingly, in the month of December following, a charter is granted by the same king, reciting this proceeding, and then, by the consent of the prelates and nobles, &c., ratifying and confirming that which had been granted and confirmed by the previous charter. The proceeding in this case, therefore, is entirely different from that which took place in the case of Rex v. Miller; for there the constitution of the borough was settled by the express regulations of an act of parliament; and, consequently, it might well be held, that a confirmation framed by the joint act of all the branches of the legislature, could not be altered at the individual pleasure of the crown. But here, it is quite clear that the king, in his answer to the commons, specially reserved to himself the right of granting the charter under the great seal, thereby taking upon him as his own act, to confirm and ratify that which was the prayer of the petition of the commons. It seems mani-

fest to me, therefore, that the proceeding in the 47 Edward 3, had not the effect of preventing the crown from granting any future valid charter, varying in its provisions from the charter of 47 Edward 3, and varying, among other things, the mode of electing the officers of the cor-I come now to consider the second objection, which applies to the charter of 9 Anne. It is said that this charter is void in itself, because the queen was deceived in making her grant, for that she manifestly granted this charter under the belief of the validity of the charter of 36 Charles 2; which charter having been founded on a surrender which was void for want of enrolment, was itself, of necessity, void also. The question, then, is, was the charter of 9 Anne founded on the charter of 36 Charles 2? I am of opinion that it was not. It does not begin by reciting it: it does not go on to confirm it. The only reference it makes to it is, that the queen releases to the corporation the power of removing its members, which the charter of 36 Charles 2 had reserved to the crown, and releases any just grounds of complaint which she might have against the corporation for not having acted conformably to the charter of 36 Charles 2. Does that import that the queen was then acting in conformity with the charter of 36 Charles 2? Might it not very well be, that the queen, at that time, for the sake of ease and quiet to the corporation of the city of Bristol, and of avoiding any doubts or questions that might be made during her own reign or after her demise, might have said, "I will release you from all that odious power of removal which the charter of King Charles the second reserved to the crown, and if any of you have offended against the terms of that charter, I will release you from the consequences of that also?" It seems to me, that this is by far the most reasonable construction of the charter: and if so, the ground of the argument fails altogether. The two points already mentioned are questions of law: I come now to consider that which is rather matter of fact than of law.

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charter of Queen Anne, the mayor and sheriffs are to be elected by the common council, in such manner as they had been elected for the space of 40 years prior to the granting of that charter. That space of 40 years will go back beyond the date of the charter of Charles the second. The affidavits in answer to the rule say, that the present election has taken place agreeably to the usage that has prevailed since the time of the charter of Queen Anne. will suppose that the affidavits stopped there. had, they would have shewn an usage, which, in my opinion, ought to prevail, in the absence of any other usage to the contrary. But those who have made these affidavits have not stopped there, for they have gone on to shew that this has been the uniform course ever since the time of Queen Elizabeth. It is argued on the part of the relators, that nothing that has been done since the granting of the charter of Queen Anne, and for above 40 years before that charter, is entitled to any weight, because it appears from the affidavits that the same practice has prevailed ever since the reign of Queen Elizabeth, when there was in fact no select body, no common council. is contended that the first institution of a common council. as a select body, was by the charter of Charles the second; but it by no means appears to me that the documents which have been referred to prove any such thing. There is, indeed, an entry in the reign of Henry 5., stating, that, in consequence of the death of one of the sheriffs during his year of office, at a meeting of the good men of the common council assembled in the council house, they elected out of themselves three persons, in order that one of those three persons might be chosen by the king and his council to be sheriff. The return of that election made by the corporation to the crown, is, "We, the mayorand commonalty, of our common assent, have chosen three persons out of ourselves, in order that out of those three persons one may be chosen by our lord the king and his council, as sheriff of Bristol; and it is said, that this being the re-

turn of the whole body corporate, is utterly inconsistent with the idea of an election by a select body. It does not, however, appear to me, that any such inconsistency arises. The corporation at large were to make a return to the crown of the persons elected, in order that out of those persons the crown might chuse one. They might very well say " We have elected these persons according to the ancient usages of the corporation," although in point of fact the election took place, not at an assembly of the body at large, but at an assembly of a select body; supposing that select body to have existed and to have exercised that privilege, for a long period of time. It appears to me, therefore, that these documents by no means shew that there was no common council subsisting, as a select body, so far back as the reign of Queen Elizabeth; but on the contrary, that this entry of an election by the common council. shews that there was. But then it is said that there are no entries in the corporation books of any elections of common-councilmen before that time, to shew how they were elected, or how the vacancies were filled up. That may very well be the case. I have no doubt in my own mind that the common-councilmen, antecedently to the charter of Charles the second, had been very irregularly selected and chosen, and not perhaps according to any precise or definite rule. But taking that to be so, still, if they had in fact existed as a known body, although irregularly chosen, and as the charter of Queen Anne set at rest any irregularities which may have been so committed, it is now immaterial to inquire whether the body was duly and regularly constituted or not. There being a body of the same name, they will be now well constituted by the charter of Queen Anne. For these reasons I think that we ought to discharge this rule. I have given my opinion upon this case somewhat at length; but I do not entertain any doubt either upon the law or; the facts of it: and not entertaining any reasonable doubt, I think I am called upon to discharge this rule. If we were to grant the rule

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upon any trivial grounds, we should be calling in question the rule and government of one of the most important corporations in the kingdom. We ought to be very cautious how we set on foot an inquiry that may have the effect of disturbing such a corporation. I do not mean to say that the law is to differ in the case of a great corporation from that which would be law in the case of a small corporation. All I mean to say is this:—That in proportion to the importance of any subject which is presented to our consideration, the human mind is so constituted, or, at least, my mind is so constituted, as to require somewhat more of conviction, or rather of proof, before I can consent to interfere with long established usages and customs.

BAYLEY, J.—My Lord Chief Justice has entered so fully into this subject, and has with so much clearness and distinctness expressed the grounds upon which his opinion is founded, that it is not necessary for me to say more than that I entirely concur in every one of the observations which he has made. I will only add this:—That I consider it to be the duty of the Court to grant an information where real doubt exists in their minds, upon looking into the circumstances of each particular case; but that they have, on the other hand, a bounden duty to refuse a rule, when they do not see that it is likely to be attended with beneficial consequences, and when they do see that it would be calculated to unsettle the rights of a large body of individuals, and to undo that which has been doing for a long series of years.

HOLROYD, J.—I think there is no doubt upon either of the points that have been urged; and, considering the nature of the case, I concur in the opinion that the rule ought to be discharged.

Rule discharged (a).

(a) Littledale, J., was gone to chambers.

In Rex v. Goldney and Savage, which was a similar motion against the sheriffs of Bristol, the rule was also discharged on the same grounds. The affidavits set forth the same facts, except that there appeared to be an entry of an election of a sheriff in the reign of Henry 5, by the mayor and common council, the return of which to the crown by the corporation at large began, "We, the Mayor and Commonalty have elected," &c., which it was argued proved that the term "common council" meant, not any select body, but the commonalty at large. One point made upon moving for this rule was, that three years had not elapsed since the defendants had previously served the same office, which it was contended rendered their present election void, under the statutes 14 Edward 3, c. 7, and 1 Richard 2, c. 11, but the Court being of opinion that those statutes did not apply to the sheriffs of cities and towns corporate, though counties of themselves, but only to the sheriffs of counties, chosen by the crown, refused the rule on that point.

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# CASES

#### ARGUED AND DETERMINED

IN THE

## COURT OF KING'S BENCH,

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### TRINITY TERM,

IN THE SEVENTH YEAR OF THE REIGN OF GEORGE IV.

Anne Stokes, administratrix of Edmund Stokes. deceased v. BATE (a).

ASSUMPSIT on a promissory note made by the defendant to the intestate. The declaration contained two by adminissets of counts, one upon promises to the intestate, and the other upon promises to the plaintiff as administratrix. note given to The breach to the first set of counts stated, that defendant intending to defraud the intestate in his lifetime, and ministration of plaintiff, as administratrix, after his death (to which plaintiff, administration of all and singular the goods, chattels goods, &c., of and credits which were of the said Edmund Stokes, duly granted

(a) The puisne Judges of this Court, sat, as on former occasions, under the king's warrant, from Tuesday the 9th, to Saturday the 13th of May, inclusively, when this and the following cases were decided.

of all and singular the goods, &c., of intestate, modo et forma. Issue thereon. Proof of the letters of administration as described in the declaration; and proof that intestate, at the time of his death, had bona notabilia in another diocese in a different province: no evidence of the place of defendant's residence at the time of intestate's death:-Held, first, that the letters of administration were not void, but passed to plaintiff all the goods of intestate within the diocese of C.; second, that the only issue joined was, whether administration was duly granted by the bishop of C, and that the question, whether defendant at the time of intestate's death resided within the diocese of C., was not parcel of that issue: and third, that if defendant relied on the fact of his residence within a different diocese, he was bound to plead it specially.

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Declaration in assumpsit, tratrix, upon a promissory intestate, averring, that adall and singular the intestate, was by the bishop of C. Plea. that plaintiff was not, nor ever had been administratrix

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deceased, at the time of his death intestate, by A. B., Vicar-General and official principal of the bishop of Chester, in due form of law was granted in that behalf), had not paid the several sums of money to the intestate in his life-time, or to plaintiff, administratrix, as aforesaid, since his death, although often requested so to do: concluding with a profert. The plea, after craving over of, and setting out the letters of administration, alleged that plaintiff was not, nor ever had been, administratrix of the goods and chattels, rights or credits, which were of the said Edmund Stokes, deceased, modo et formâ. Issue on the plea. the trial, before Garrow, B., at the Shropshire summer assizes, 1825, the plaintiff produced letters of administration in the common form, granted by the bishop of Chester, in which diocese the intestate lived and died and had property, and which is in the province of York. The defendant then proved that the intestate at the time of his death had bona notabilia in the diocese of Litchfield and Coventry, which is in the province of Canterbury; and thereupon contended, first, that the letters of administration were void in toto, and the plaintiff was not administratrix of the estate and effects of the intestate at all; and second, that at any rate she was not administratrix with reference to the promissory note in question, the letters of administration empowering her to sue for such assets only as were proved to have been in the diocese of Chester. The learned Judge reserved both points: and the plaintiff had a verdict, with liberty to the defendant to move to enter a nonsuit.

Campbell, in Michaelmas term last, moved accordingly. Where there are bona notabilia in several dioceses in the same province, the Prerogative Court must grant administration; but where there are bona notabilia in one diocese of one province, and in another diocese of another province, the bishop of each diocese must grant administration, Burston v. Ridley (a). The effect of that

(a) 1 Salk. 39.

decision is, that the administration granted in this case by the bishop of Chester is void, because there were bona notabilia in another diocese, and no administration was granted by the bishop of that other diocese. If that is so, it follows that the plaintiff is not administratrix at all of the goods of the intestate. But even if the administration granted by the bishop of Chester is valid, still, as there was no evidence that the defendant resided within the diocese of Chester at the time when the intestate died. the plaintiff cannot be administratrix with reference to this debt, and cannot maintain any action for it against him. In either view of the case, therefore, this action is not maintainable. Upon the issue joined, it was the duty of the plaintiff to prove the residence of the debtor within the diocese of Chester, as part of her case; and not having done so, she must abide the consequences.

ABBOTT, C. J.—It is clear that where an intestate has bona notabilia in two dioceses within the same province, letters of administration cannot be granted by the bishop of either diocese, but must be granted by the metropolitan of the province. But where an intestate has bona notabilia in one diocese of one province, and in another diocese of another province, the case is very different. The two dioceses of Chester and Litchfield are not within the same province, and therefore the letters of administration granted by the bishop of Chester are not void, but will entitle the plaintiff to sue as administratrix for any debt,

where the debtor resided within that diocese at the time of the intestate's death. The other question is, whether, upon the issue joined in this case, it lay upon the plaintiff to prove her title as administratrix to sue for this debt, by shewing that the defendant, at the time of the intestate's death, resided within the diocese of *Chester*, by the bishop of which the administration was granted. If the defendant was in a situation to shew that he in

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been more convenient to have pleaded that matter specially, but as there may be some doubt whether he was bound so to plead it, he may take a rule on that point.

The other Judges concurred.

Rule nisi, on the second point only.

W. E. Taunton, and Russell, now shewed cause. Debts by specialty are bona notabilia, not at the place where the securities were made, Lunn v. Dodson (a), nor where the testator or intestate died, Byron v. Byron (b), but at the place where the securities are at the death of the testator or intestate; but simple contract debts, as debts due on bills of exchange, &c., follow the person of the debtor, and the will must be proved, or administration granted, in that place where the debtor resided at the time of the death of the testator or intestate; Yeomans v. Bradshaw (c). Then, if the debtor in this case resided within the diocese of Chester at the time of the death of the intestate, the debt was bonum notabile in Chester, and the plaintiff, so far as regards that debt, was duly appointed administratrix. Now, there was no evidence upon this point one way or the other; and it is to be presumed, until the contrary is shewn, that the debtor resided within the jurisdiction of the officer who granted the letters of administration. The plaintiff, having produced letters of administration from the bishop of Chester, had done enough; and it was for the defendant to shew that this debt did not pass under them, by proving that the debtor resided out of the diocese of Chester at the time of the intestate's death. Then, secondly, if the defendant intended to rely upon that fact, in order to shew that the plaintiff was not entitled as administratrix to sue for this debt, he ought to have introduced that matter in his plea.

<sup>(</sup>a) 1 Rol. Abr. 908 (G) pl. 4.

<sup>(</sup>c) Carth. 373.

<sup>(</sup>b) Cro. Eliz. 472.

would seem that such evidence is not admissible under the plea of ne unques administratrix (for such a plea merely states that the plaintiff is not administratrix modo et forma), and that the defendant ought either to have demurred, or to have pleaded specially that the debtor resided in another diocese, at the time of the intestate's death: Hilliard v. Cox (a), Mellor v. Barber (b), Noel v. Wells (c), Allen v. Dundas (d), Rex v. Sutton (e). The general rule of pleading certainly is, that the plea must deny the whole or some essential part of the facts averred in the declaration, or admit them to be true, and allege other facts that render them inoperative. But here the plea introduces no new matter, but simply denies the fact averred in the declaration, namely, that the plaintiff is administratrix. The only fact, therefore, put in issue is. whether the letters of administration have been duly granted; and that question was decided by the Court in favour of the plaintiff, at the time when this rule was moved for.

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Campbell, and C. Phillips, contrà. There are two questions in this case. First, what was the issue to be tried? And second, upon which of the parties lay the onus of proving that issue? If the issue is merely, whether the bishop of Chester granted letters of administration to the plaintiff, it must be admitted, that the Court have already answered that question in the plaintiff's favour. But that is not the whole issue. The issue is twofold, and involves these two questions: first, did the bishop of Chester grant the letters of administration? and, second, did this particular debt pass under them? Unless both those questions can be answered in the affirmative, the plaintiff has no title to sue; and if she has averred the affirmative of both, she was bound to prove them both. What has she averred?

<sup>(</sup>a) 1 Lord Ray. 562.

N. P. 143.

<sup>(</sup>b) 3 T. R. 387.

<sup>(</sup>d) 3 T. R. 125.

<sup>(</sup>c) 1 Lev. 236. 1 Sid. 359. See Com. Rep. 150. Anon. Bull.

<sup>(</sup>e) 1 Saund. 274. See note 3.

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She declares, in substance, that she is administratrix of the particular debt for which she sues, and that declaration the defendant by his plea denies. Then, if that is the issue, the plaintiff was bound to prove, not only that the letters of administration were granted in Chester, but that the defendant resided in the diocese of Chester at the time of the intestate's death; for unless he did so, the debt in question did not pass under the letters of administration, for nothing passes to the administrator out of the diocese in which the administration is granted. Com. Dig. Adminis-Now the latter fact she has not proved, trator (B 3). and therefore she cannot maintain this action. foundation for the objection to the form of the plea. plea denies that the plaintiff is administratrix modo et forma; and therefore puts in issue two propositions: first, that the administration was duly granted; and second, that this debt passed under it. The affirmative of both those propositions lay upon the plaintiff; for it could not be incumbent on the defendant either to plead specially, or to prove, matter which would be merely negative. are there any authorities to shew that such matter as this must be pleaded specially. Hilliard v. Cox (a), Mellor v. Barber (b), and Yeomans v. Bradshaw (c), certainly shew that, in those particular cases, it was deemed advisable to plead specially; but they are by no means authorities for saying, generally, that it is necessary to do so: and Mr. Serjeant Williams, in his note to Rex v. Sutton (d), expressly says, "the defendant may give in evidence upon the plea of ne unques executor, that there were bona notabilia; for it confesses and avoids, and does not falsify the seal of the ordinary."

BAYLEY, J.—Looking at the form of these pleadings, it seems to me that the question, whether the defendant, at the time of the death of the intestate, was resident within

<sup>(</sup>a) 1 Lord Ray. 562.

<sup>(</sup>b) 3 T. R. 387.

<sup>(</sup>c) Carth. 373.

<sup>(</sup>d) 1 Saund. 274. Note (3).

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the diocese of Chester, is not part and parcel of the issue to be tried. The declaration alleges, that administration of all and singular the goods and chattels of the intestate at the time of his death, was granted to the plaintiff by the bishop of Chester. The plea sets out the letters of administration upon over, and avers that the plaintiff is not, and never has been, administratrix of all and singular the goods and chattels of the intestate, in manner and form as the plaintiff has, in her declaration, in that behalf alleged. Upon that plea issue is joined. The plea does not state that the plaintiff is not administratrix quoad the particular debt which is the subject-matter of the action; but only that she is not administratrix in manner and form as she has described herself to be. The plea, therefore, only puts in issue, whether the plaintiff is administratrix so as she has described herself to be. I am of opinion, both upon principle and authority, that if the defendant meant to contend, that by reason of any matter dehors the letters of administration, the plaintiff was not administratrix quoad the debt which formed the subject-matter of the action, he was bound to plead such matter specially. The cases upon the subject clearly shew that this has been the course of practice. In Yeomans v. Bradshaw (a), the action was brought by an administratrix against the drawer of a bill of exchange. The letters of administration were granted by the bishop of Durham. The plea was, that the city of London was without the diocese of Durham, and within the diocese of London; and that the defendant, at the time of the death of the intestate, was an inhabitant and commorant without the diocese of Durham, to wit, at London, within the diocese of London. plea there was a demurrer, and the Court held, that the bill of exchange was a simple-contract debt, which followed the person of the debtor, and gave judgment for the defendant. In Hilliard v. Cox (b), which was an action by an administrator, for goods sold and delivered by

<sup>(</sup>a) Carth. 373.

<sup>(</sup>b) 1 Salk. 37. 1 Lord Ray. 562.

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her declaration alleged, does not imply that the bishop had not authority to grant administration of the particular debt which is the subject-matter of the action. The general rule, that where the defendant intends to rely on any new matter as a defence, he must state it on the face of his plea, Com. Dig. Plead. (E. 10), applies to this case; for, otherwise, this inconvenience would follow, that an administrator, upon an issue like the present, would be called upon to prove the place of the debtor's residence, of which he may naturally be perfectly ignorant; whereas, if the debtor, who must know the fact, is bound to allege it, the administrator has the opportunity of taking out fresh letters of administration, so as to meet the real facts of the case.

LITTLEDALE, J.—I am of the same opinion. It seems to me impossible to say, that the question, whether the defendant at the time of the intestate's death resided within the diocese of Chester, is parcel of the issue in this case. The plaintiff's allegation, that administration was granted to her by the bishop of Chester, is verified by the profert of the letters of administration. They are in the common and ordinary form, and though they purport to pass all and singular the goods and chattels of the intestate, that expression can mean such goods and chattels only as the bishop, who granted the administration, had jurisdiction over. The declaration, therefore, in substance, only avers, that administration was granted to the plaintiff of such of the goods and chattels of the intestate, as were within the jurisdiction of the bishop of Chester; the plea denies that fact, and that only, and that is all that is put in issue. That issue has been properly found for the plaintiff, and therefore there is no ground for disturbing the verdict.

Rule discharged.

#### SHORLAND V. GOVETT.

TRESPASS for breaking and entering plaintiff's dwelling house, and there remaining until plaintiff, in order to regain possession, paid defendant a sum of 1191. 10s. 9d. Pleas, as to breaking and entering the dwelling house, and dwellingthere remaining, first, the general issue, not guilty. cond, actio non, because before the said time when, &c., ing until plainto wit, on, &c., Sir W. T., bart., sued out of the court of our lord the king, before the king himself at Westminster, money. Plea, a certain writ of fieri facias, directed to the sheriff of entered under Somersetshire, commanding him to cause to be levied of a writ of fi fa: the goods and chattels in his bailiwick of J. H., R. S., thereon diand plaintiff, as well a certain debt of 2001, which the said Sir W. T. had then lately recovered against them in cation, that behis said majesty's said court, as also 101., which in the same court were awarded to the said Sir W. T., for his were fully exedamages, &c.; which said writ was delivered to the said dant exacted sheriff, who made his warrant to R. S. and defendant, then, and at the said time, when, &c., being a bailiff of the said sheriff, and thereby, by virtue of the said writ, commanded them, &c., which said warrant afterwards, and cation alleged before the return of the said writ, and before the said time stituting dewhen, &c., to wit, on, &c., was delivered to defendant, so fendant a tresbeing such bailiff, to be executed in due form of law; by virtue of which said writ and warrant defendant afterwards. and before the return of the said writ, to wit, at the said time when, &c., peaceably entered the said dwelling-house in order to levy the debt and damages aforesaid, according to the exigency of the said writ, and on that occasion, and for that purpose, stayed and continued in the said dwellinghouse for the said space of time in the said declaration mentioned, being a reasonable time in that behalf; concluding with a verification. Replication to the second plea, that the writ and warrant in that plea mentioned, were respectively indorsed to levy a much smaller sum

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Trespass against a bailiff, for breaking and entering plaintiff's house, and there remaintiff paid defendant a sum of that defendant and warrant recting him to levy. Replifore the writ and warrant cuted, defenmore than the sum he was entitled to levy :—Held, that the replino facts conpasser ab initio, and was therefore bad on demurrer.

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than the debt and damages in that plea mentioned, to wit, 1101. 15s., besides poundage, &c., and that shortly after defendant entered into the dwelling-house, in which, &c., and while he stayed and continued therein, as in the said second plea mentioned, and before the said writ and warrant were fully executed, defendant, under colour and pretence of the said writ and warrant, extortionately and unlawfully demanded, exacted and received, of and from plaintiff, a much larger sum of money, to wit, 31. 10s. more than he was entitled to levy upon the goods and chattels of plaintiff, under and by virtue of the said writ and warrant, and according to the direction indorsed thereon, as aforesaid; which said sum of 31. 10s., together with the further sum of 1161. Os. 9d., amounting in the whole to a large sum, to wit, 1191. 10s. 9d., being the amount then and there claimed by defendant by virtue of the said writ and warrant, plaintiff was forced and obliged to pay for the purpose in the said declaration mentioned; concluding with a verification. Demurrer to the second plea, and joinder in demurrer.

E. Lawes, in support of the demurrer. This replication is bad. It was doubtless framed under the idea that the facts stated in it were sufficient to constitute the defendant a trespasser ab initio. But they are not; the original entry having been made under the authority of the law, the subsequent extortion will not make the defendant a trespasser ab initio, for that was merely an act of nonfeazance; and where the original duty is lawful, a subsequent act of nonfeazance will not suffice to make the party a trespasser ab initio; such subsequent act must be itself a trespass; The six Carpenter's case (a). Had the plaintiff made a tender of the sum, which the defendant was authorised to levy, and had the defendant afterwards persisted in remaining in possession, that might have been a trespass.

(a) 8 Rep. 146.

Manning, contrà. There is no authority which goes the length of saying, that an act of misfeazance, in order to constitute the party a trespasser ab initio, must be itself an act of trespass. The six Carpenter's case (a), certainly does not go that length, but on the contrary, shews that a subsequent abuse of the legal process under which the original entry is made, shews quo animo the party acted, proves the original purpose to have been tortious, and entitles the plaintiff to say that the defendant entered for that purpose, and no other. Lord Coke there says, " It was resolved, when entry, authority, or license is given to any one by the law, and he doth abuse it, he shall be a trespasser ab initio; but where an entry, authority, or license is given by the party, and he abuses it, there he must be punished for his abuse, but shall not be a trespasser ab initio. And the reason of this difference is, that in the case of a general authority or license of law, the law adjudges by the subsequent act, quo animo, or to what intent he entered; for, acta exteriora indicant interiora secreta." He then goes on to cite instances illustrative of that resolution. [Holroyd, J. Every one of which instances is a clear act of trespass]. That is so, undoubtedly, but Lord Coke afterwards adds, "It was resolved that not doing, cannot make the party who has authority or license by the law, a trespasser ab initio, because not doing is no trespass;" but the act complained of here cannot be called "not doing;" it is at least an act of misfeazance, and therefore not within that second resolution. The real distinction in all these cases is between nonfeazance and misfeazance, as was laid down by the court of Common Pleas, in Gates v. Bayley (b). In Winterbourne v. Morgan(c), where the defendant entered under a warrant of distress for rent in arrears, and continued in possession of the goods upon the premises for fifteen days, during the last four of which he was removing the goods, which

(a) 8 Rep. 146.

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<sup>(</sup>c) 11 East, 395.

<sup>(</sup>b) 2 Wilson, 313.

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were afterwards sold under the distress; it was held that at any rate he was liable in trespass quare clausum fregit for continuing on the premises, and disturbing the plaintiff in the possession of his house, after the time allowed by law. In Griffin v. Scott (a), it was held that trespass would lie against a landlord for allowing the distress to remain an unreasonable time upon the premises. Aitkenhead v. Blades (b), it was held that if a sheriff continues in possession after the return day of the writ, that is an irregularity which makes him a trespasser ab initio; and that is a decision peculiarly applicable to the present case: for here, the duty of the defendant was to quit the premises whenever he had received the sum which he was authorised to levy, instead of which he remained until he had extorted a larger sum. In Phillips v. Bacon(c), Lord Ellenborough expressed an opinion, that if the sheriff departs from his duty in making a mock sale of the goods, it would bring the case within the principle of the six Carpenter's Case (d), and make the sheriff a trespasser ab initio. In Girling's Case (e), the Court said, the sheriff ought to return his writ, otherwise his justification is not good; and in 2 Rol. Abr. 562, Trespass ab initio, and 20 Vin. Abr. Trespass, 501, 502, many cases are given, in which an officer who has the execution and return of process, and either neglects to return the writ, or makes a false return, is declared to be a trespasser ab initio. these are cases in which the original entry was lawful; they all shew that the subsequent act need not be per se an act of trespass in order to render the party a trespasser ab initio: and they are all, therefore, authorities for saying that the replication in this case is sufficient.

BAYLEY, J.—I am of opinion that this replication is

<sup>(</sup>a) 2 Lord Ray. 1424.

<sup>(</sup>d) 8 Rep. 146.

<sup>(</sup>b) 5 Taunt. 198.

<sup>(</sup>e) Cro. Car. 446.

<sup>(</sup>c) 9 East, 298.

bad, and that the defendant cannot be considered as a trespasser ab initio. The class of cases last cited, in which it is said a sheriff is made a trespasser ab initio by neglecting to return the writ, or by making a false return, does not apply to the present; and the expression there is somewhat incorrect, for the real effect of those cases is, that the sheriff having neglected his duty is unable to make out his justification. The distinction seems to me to be this: -- Where the facts alleged in the plea primâ facie constitute a good defence, and the replication contains other facts which do away that defence, the defendant becomes a trespasser ab initio: but where a sheriff seizes goods under the authority of a writ of which it is his duty to make a return, but of which he in fact makes no return, he never has any justification; for he must allege the return in his plea. A bailiff, not having the return of process, is of course not bound to allege such return; and that was the decision in Girling's Case (a). In the present case, the defendant had a good justification without alleging any return, and that justification he pleads. The plaintiff to that replies, "that before the writ and warrant were fully executed, the defendant demanded, exacted, and received of him a larger sum than he was authorised to levy." But supposing that to be true, it does not constitute the defendant a trespasser quoad the acts complained of in the declaration, because the subsequent act complained of in the replication is not under the circumstances an act of trespass per se. When the subsequent act is in itself a trespass, it relates back to the original entry, and renders that a trespass too; because the law then assumes that the party entered, not for the purpose alleged in the plea, but for the purpose of committing the trespass. Here the subsequent act was not a trespass, and does not refer back to the original entry; for there is no ground for supposing that the original entry was made for the purpose of extortion. If the defendant could be

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deemed a trespasser ab initio here, he would be liable to refund the whole of the money levied; but he was clearly entitled to levy the whole of it, except the 3l. 10s. For these reasons I am of opinion that the defendant cannot be deemed a trespasser ab initio, and, therefore, that he is entitled to judgment on the demurrer.

HOLBOYD, J.—If the facts alleged in the replication in this case were held sufficient to constitute the defendant a trespasser ab initio, the consequences to him would be very serious, for he would be liable for damages not merely to the amount of the sum illegally exacted, and for which he is still liable, but to the whole amount of the sum levied; and the same result would follow in a great variety of cases, and would be productive of much mischief, because the smallest excess would then render the whole seizure, to whatever amount, illegal. The cases cited as to the necessity of the sheriff returning the writ, are inapplicable to the present; for there, except for the return, the act of the sheriff is illegal ab initio: and instead of saying that the want of a return makes the sheriff a trespasser ab initio, the proper expression would be, that the return is necessary in order to render his act legal ab The only question is, whether the language of the first resolution in The six Carpenter's Case (a), is strictly correct, namely, that the defendants were not trespassers ab initio, because their subsequent act was not itself a trespass. The replication here does not allege that the defendant kept possession of the goods for a longer period than that allowed by law; but only that he exacted 31. 10s. more than he was entitled to levy. Until the first sum, the amount of the levy, was paid, the defendant was justified in keeping possession; and as both sums were paid at the same time, his keeping possession up to that time was no trespass. The plaintiff does not even aver that he first tendered the amount of the levy alone, and that

the defendant refused to accept it; but even that averment would, according to my Lord Coke's doctrine (a) have been insufficient. I agree, therefore, that the defendant is entitled to judgment.

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LITTLEDALE, J.—If the defendant in this case is a trespasser ab initio, the plaintiff is clearly entitled to recover the whole sum levied, the same as if no justification at all had been pleaded. The consequences of such a state of things would be extremely inconvenient; and supposing such an action has been thought maintainable, and considering how frequent the instances of extortion are, it seems not a little surprising that no such case can be found. It is, however, insisted on the part of the plaintiff that the law as laid down in the six Carpenter's Case goes that length. I confess that the doctrines advanced in that case appear to me somewhat extraordinary; but without, for the present, deciding whether they are, or are not tenable, it is sufficient to observe, that every one of the instances there put by Lord Coke is in itself an act of trespass, rendering, therefore, the party liable to be deemed a trespasser ab initio: in which respect that case differs entirely from the present. Com. Dig. Trespass (C 2), Dye v. Leatherdale (b), and Taylor v. Cole (c), are all authorities in support of Lord Coke's opinion in that respect, and all go upon the principle, that where the original act is lawful, the subsequent act must be a positive act of trespass, in order to render the party a trespasser ab initio. Here, there is no act of trespass shewn subsequent to the original entry and levy; for the keeping possession of the goods was clearly lawful, and the extortion is alleged to have been before the writ and warrant were fully executed. The extortion was clearly unlawful, but it was no trespass; for none of the statutes against extortion declare that the party guilty of it shall be deemed a trespasser, and none

<sup>(</sup>a) 8 Rep. 146.

<sup>(</sup>c) 3 T. R. 292.

<sup>(</sup>b) 3 Wilson, 20.

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of the cases cited in Com. Dig. title, Extortion, or Trespass ab initio, describe extortion as an act of trespass. am, therefore, of opinion, that this replication is bad, and that our judgment must pass for the defendant.

Judgment for the defendant.

#### Merceron v. Dowson.

Declaration in covenant against the assignee of a lease for nonrepair, that all the interest of A., the lessee, came to defendant by assignment, and that afterwards the premises were out of repair. Plea, in bar, that defendant was at one time possessed the premises, as tenant in common with B., C., and D.; and at another time of one third. as tenant in common with C. and D.; and that no greater interest in the premises ever came to defendant by assignment.

DECLARATION in covenant for not repairing premises demised by indenture to A. B., for 99 years, averring that all the interest of A. B. in the premises, came to and vested in defendant, by assignment, and that afterwards, and during the term, to wit, on the 1st January, 1820, the premises were, and from thence hitherto have been, out of repair, &c. Pleas, first, non est factum; second, that all the interest of A. B. did not come to and vest in defendant; third, actio non, because, before the 30th December, 1819, to wit, on the 5th August, 1817, defendant became, and from thenceforth continually, until the day and year hereinafter next mentioned, was possessed of and of one sixth of in one undivided sixth part only of and in the said demised premises, with the appurtenances, to wit, as tenant in common with one C. D., and E. F., and G. H.; and that defendant afterwards, to wit, on the 23d February, 1824, became, and from thenceforth until the commencement of this suit, was possessed of and in one undivided third part only of and in the said demised premises, to wit. as tenant in common with one E. F., and G. H.; and that the defendant had not, by assignment or otherwise. at the commencement of this suit, or at any time theretofore, any greater interest in the said demised premises

On demurrer:-Held, that the plea was bad, both in form and substance.

than as in this plea mentioned: concluding with a verification. Issue on the first two pleas. Demurrer to the third plea, and joinder in demurrer.

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Comyn, in support of the demurrer. The plea demurred to cannot be supported either as a plea in bar, or in abate-The facts stated in the plea do not constitute a bar, because, instead of shewing that the defendant is not liable at all, they admit his liability to a certain extent, jointly with other persons: and although those facts might have been sufficient to form a plea in abatement, still in the present case they are insufficient even for that purpose, because they do not shew by what means the defendant became tenant in common with those other persons, which the plea ought to have done. Com. Dig. Abatement, (F It would be extremely inconvenient to allow several assignees of a lease to plead severally in bar to an action like the present; and to hold this good as a plea in bar would be a great hardship upon the plaintiff, because he must be presumed to be ignorant of the particulars of the defendant's title. It may be contended, on the authority of Congham v. King (a), that the plaintiff might have declared against the defendant, as assignee of part of the premises; but there the covenant was divisible, and the action was brought in respect of a divided share of the premises: here, the plea admits that the defendant is possessed of an undivided share of the premises. It was, indeed, held in Stevenson v. Lambard (b), that rent may be apportioned; but rent, being a mere matter of figures, is, from its very nature, divisible, and, in that respect very different from repairs: and even the decision in that case which proceeded entirely upon the authority of Congham v. King, shews that in an action of debt for rent, an eviction as to part cannot be pleaded in bar of the whole action. Upon these grounds it seems clear, that this plea is bad.

<sup>(</sup>a) Cro. Car. 221.

<sup>(</sup>b) 2 East, 575.

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J. L. Adolphus, contrà. The defendant is charged as privy in estate with the original lessee. The declaration avers, that all the interest in the premises vested in the defendant; which the plea denies, and alleges in substance, that no more than one third part ever came to the defendant. In Hare v. Cater (a), the plaintiff declared against the defendant as assignee of all the estate in the demised premises; and it appearing in evidence that he was assignee of a part only, it was held a fatal variance: for the assignee of a part must be charged according to the real state of the case. [Bayley, J. There the defendant was only under-lessee, but was charged as assignee]. It was held in Holford v. Hatch (b), that covenant will not lie at the suit of the lessor, against an under lessee; and the case of Hare v. Cater was there referred to, and it is said that Lord Mansfield there declared the objection to be unanswerable. The assignee must be charged according to the truth of the case; Com. Dig. Covenant, (C 3.); and in Congham v. King (c), and Gamon v. Vernon (d), the party was charged as he was proved to be; namely, as sole assignee of a part. In actions for rent, tenants in common may sue and be sued separately, because the subject matter of the covenant, the rent, is divisible. But in actions for non-repair, the subject matter of the covenant, the repair, is indivisible, and the damage being uncertain, is not distributable; and therefore it has been held that tenants in common must join in an action for non-repair against the assignee of a tenant. Bac. Abr. Joint Tenants, (K).; Kitchen v. Buckly (e). Then if one tenant in common cannot sue alone, it follows, that he cannot be sued alone, for a breach of a covenant to repair; and he ought not to be driven to his plea in abatement, for it is not necessarily within his knowledge who the other tenants in common are-

<sup>(</sup>a) Cowp. 766.

<sup>(</sup>d) 2 Lev. 231.

<sup>(</sup>b) Doug. 184, note 21.

<sup>(</sup>e) 1 Lev. 109.

<sup>(</sup>c) Cro. Car. 221.

BAYLEY, J.—I am clearly of opinion that this plea is bad. When the nature of the action, and the rights of the lessor on the one hand, and the obligations of the lessee and his assignee on the other, are properly considered, the case becomes free from all doubt and diffi-The covenant to repair runs with the land, and is a charge upon the estate. Where an estate is divided, the division is such as, either to pass separate parts to separate persons, or to pass undivided interests. In the present case, the division is of the latter kind, and the question then is, whether under such circumstances, the defendant is liable to be charged as the plaintiff charges him. the declaration certainly charges him as the assignee of all the interest of the original lessee, A. B., and it is but just that the plaintiff should be allowed to adopt the general form of pleading, because it cannot be supposed that he is acquainted with the particulars of the defendant's title. Where the plaintiff knows the several persons in whom the whole interest is vested, he is bound to join them all in his action; and to that extent the argument raised on the part of the defendant is correct: but he has attempted to carry it further, and has insisted, that even where the plaintiff is ignorant of the other assignees, one cannot be sued singly, and Hare v. Cater (a), has been quoted as an authority in point. That case, however, when fally stated, will be found to be very distinguishable from the present. There, Lord Bolingbroke, being tenant for life, with power to lease, demised certain premises in Kent, and others in Surrey, to the plaintiff, at a pepper-corn The plaintiff re-demised the premises to Lord Bolingbroke, at the yearly rent of 500l. The defendant afterwards purchased the premises in Kent, but not those in Surrey, but took no assignment of the lease from the plaintiff to Lord Bolingbroke. The plaintiff brought covenant for the rent.—So that there the defendant was never assignee at all of the interest out of which the (a) Cowp. 766.

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plaintiff claimed the rent, for the rent was claimed out of the term, which never was assigned, and was besides issuing out of two distinct estates, one of which never vested in the defendant. There are many cases shewing that the assignee of a part, is liable for the repair of that part. The defendant is the assignee of the lessee; and though he has no entire interest in any part of the estate, he has a qualified interest in the whole: and as the whole estate is burthened with the liability to repair, he is liable for a portion of the repair commensurate with his in-But he by his plea says, that he is not liable at That is a plea in bar, and as such, clearly bad. should have pleaded that he was not liable for the whole in the manner in which he is charged, and should have described the other persons who are jointly liable with him, so as to enable, and consequently to compel, the plaintiff to join them in the declaration. His only ground of objection is that he is charged singly, whereas he ought to have been charged jointly with others, and that was matter which should have been pleaded in abatement, and not in bar.

HOLROYD J.—It is quite clear that this plea cannot be supported. Even if it could be pleaded in bar of the action at all, it certainly ought to have been confined to that part of the premises of which the defendant means to insist that he is not the assignee. If it had been pleaded to the whole of the premises, except one sixth part at one period, and one third part at another period, it would have raised a very different question from that now before the Court. But this plea is further bad in form, for it neither admits nor denies the assignment to the defendant of those very parts of which he acknowledges himself to be in possession. He might, no doubt, have pleaded that there were other persons who were by assignment jointly with himself in the possession of other parts; but then such a plea must be in abatement and not in bar.

LITTLEDALE J .-- I am clearly of opinion that this plea is bad both in form and substance. It admits only possession, which standing alone means merely occupation, and not an assignment; and the subsequent part, which alleges that the defendant had, no greater interest by assignment than as in the plea mentioned, refers to the preceding part, and does not cure that informality. No issue could be taken upon this plea: it neither denies, nor confesses and avoids. It is bad in substance also. The defence it sets up is, that the whole of the premises did not come to the defendant by assignment, and that, therefore, he is not liable for any part. If that were held good in bar, the result would be, that if a lessee assigns premises to several persons as tenants in common, the lessor can never sue any one of them until he discovers them all. If the meaning of the defendant was to deny his liability except in respect of one sixth or one third, he should have confined his plea to the residue. I am by no means satisfied that, so far as that, he might not have pleaded in bar, because he might not know who the other tenants in common were; but as this plea is bad either in bar, or in abatement, it is not necessary to decide that point. It was decided in Gamon v. Vernon, that either debt or covenant will lie for rent against the assignee of part of an estate; and assuming that to be law, I see no reason why covenant should not lie against such an assignee for a portion of the damages arising from nonrepair.; for such damages appear to me to be as easily apportionable as rent. But, however that may be, it is clear that this plea is bad, and consequently the plaintiff is entitled to judgment on the demurrer.

Judgment for the plaintiff.

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1826. In Decem-

ber, 1811, A.,

who was then

in parts beyond seas,

being indebted to B., a bank-

rupt, in 1000l.,

issued against

the assignees of the latter

the former writs of spe-

cial capias,

Michaelmas term, 1812,

and Hilary

term, 1813, which were

delivered to

indorsed non . est inventus,

but retained in

detained by

Downs, went

mained there

voyage, but

was then un-

on shore at Deal, and re-

for several days, waiting

contrary winds in the

the sheriff, and by him

alias, and pluries, in

#### GREGORY v. HURRILL.

THE Lord High Chancellor sent the following case for the opinion of this Court.

In 1811, one R. L. Hipkins (since deceased), and G B. Gregory, having entered into a commercial speculation or adventure, in shipping goods on board the ship Irvine, bound on a voyage to the coast of Barbary, a partnership agreement was drawn up and signed by both parties. On entering into that agreement, R. L. Hipkins and his wife, transferred 30001. bank annuities into the name of Benjamin Walsh, a broker, to answer the purposes of the speculation, who thereupon agreed to become the agent of the concern upon the usual terms of interest, and a commission of two and a half per cent. being allowed upon the amount of all advances and payments made by him in the course of such agency, and that the proceeds of the cargo were to be remitted to Walsh, for the payment of such advances. Various goods were purchased, and the different merchants and tradesmen were referred to B. Walsh, who either paid his office. In 1814, A. being in cash, or accepted bills of exchange for the amount. goods were shipped on board the ship Irvine, bound to Algiers. The said G. B. Gregory soon afterwards sailed with the said cargo for Algiers, in the Irvine. Walsh continued to pay the bills so accepted by him on account of the goods so shipped on board the Irvine, down to the month of December, in the said year 1811, when he became to resume his a bankrupt; at which time, there was a balance, exceeding the fact of his having landed 1000l., due from Gregory and Hipkins, to B. Walsh, on account of such adventure, and which balance has not at

known to his assignees. In 1819, he returned to England to reside permanently; and in 1821, the assignees struck a docket against him for the debt above mentioned, and on 21st March assignees struck a docket against nim for the debt above mentioned, and on 21st March in that year, he was adjudged a bankrupt. Upon being allowed to bring an action to try the validity of the commission, the attorney for the petitioning creditors on the 21st May, 1821, two days after the action was commenced, took away the several writs from the sheriff's office, and on the 11th July, 1821, the last day of Trinity term, a roll of the proceedings with the continuances on the writ of pluries, brought down to the term next preceding the date of the commission, was docketed and carried in, and on the same day the three writs were filed of record:—Held, upon these facts, that the assignees of B, had not at the time of suing out the commission against A, or on the 21st March 1891. had not at the time of suing out the commission against A., or on the 21st March, 1821, when he was declared a bankrupt, a valid debt, as petitioning creditors, to support the commission.

any time since been reduced. On 24th June, 1812, while Gregory was abroad, J. T. Taylor and J. Parker, as assignees of Walsh, commenced an action by special original in his majesty's court of King's Bench, against Hipkins and Gregory, for the recovery of a debt then claimed to be due and owing from Hipkins and Gregory, to the estate of Walsh, and for that purpose sued out a writ of special capias, directed to the sheriffs of London, returnable on the morrow of All Souls, in Michaelmas term, in the aforesaid year, 1812, and indorsed for bail for the sum of 10001. and upwards. The said R. L. Hipkins being at the time of suing out the said writ a prisoner in the King's Bench prison, was detained in custody at the suit of the said assignees of Walsh, for the aforesaid debt of 1000l. mission of bankrupt was, on or about the 18th August, 1812, upon the petition of the said J. T. Taylor, and his then copartner, J. Taylor, awarded and issued against R. L. Hipkins, as the copartner in trade of Gregory, and under which commission he, Hipkins, was duly adjudged a bankrupt. At a meeting under the commission, held at Guildhall, London, on the 5th September, 1812, the said J. T. Taylor was duly chosen sole assignee of the estate and effects of Hipkins, and an assignment of such estate and effects was executed to J. T. Taylor, by the major part of the commissioners in the commission named. kins died in September, 1813. In November, 1812, Gregory being then abroad, an alias writ of special capias was sued out against Hipkins and Gregory, at the suit of the assignees of Walsh, directed to the sheriffs of London, returnable in 15 days of St. Martin, in Michaelmas term, 1812; and on the 11th December, 1812, a pluries writ of special capias was sued out by the assignees of Walsh, against Hipkins and Gregory, also directed to the sheriffs of London, and returnable in eight days of St. Hilary, in Hilary term in the following year, 1813; and both the said last-mentioned writs were indorsed for bail for 1000l. All the said writs of capias, alias, and pluries, were lodged

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at the secondary's or sheriff's office for London, in and between the beginning of Michaelmas term, 1812, and the end of Hilary term, 1813, and were severally duly returned non est inventus by the then sheriffs before the end of Hilary term, 1813. The said action was so commenced by special original in the court of King's Bench, and such several writs of capias, alias, and pluries sued out thereon, with a view to out-law the said G. B. Gregory; but no outlawry ever took place, the completion of such intended outlawry having been subsequently suspended, by reason of the commission of bankrupt having been so awarded and issued against Hipkins, as before mentioned. At the trial of the action hereinafter mentioned, such evidence of the return of Gregory to England in the month of April, 1814, was given as is hereinafter also mentioned. Gregory afterwards returned to England in July, 1819. The assignees of Walsh, on the 15th February, 1821, commenced a new action in the court of King's Bench against Gregory, as the surviving partner of Hipkins, and sued out a bill of Middlesex against Gregory, returnable on Wednesday next after 15 days of Easter in Easter term, in the aforesaid year 1821, and which bill of Middleser was indorsed for bail for 1336l. 6s. 10d., being the same identical debt, with an accumulation of interest thereon, as that for which the former action was brought against Hipkins and Gregory jointly. A warrant on the said bill of Middlesex was made out and delivered to an officer of the sheriff of Middlesex, for the purpose of executing the same, and such officer went with it to the house or residence of the said Gregory, in order to arrest him, and made several attempts to effect it, which having failed, the assignees of Walsh (the plaintiffs in that action) on the 17th March, 1821, proceeded to strike a docket, and on the 22nd March, 1821, issued a commission of bankrupt against Gregory, and he was thereupon adjudged and declared a bankrupt. Aaron Hurrill, esq., was duly chosen sole assignee of the estate and effects of Gregory,

at the second meeting of the commissioners, held at Guildhall on the 21st April, 1821. Gregory having opposed the said commission on the 12th April, 1821, preferred his petition to the Lord Chancellor, thereby praying that the same might be superseded. By an order of the Vice-Chancellor, made on hearing the said petition on the 9th May, 1821, it was ordered that the said G. B. Gregory should be at liberty to bring and prosecute an action of trover against the assignee of his estate and effects, who, on the trial, was to admit possession of goods to the value of 51. in order to sustain the said action; and the petitioning creditors under the said commission, were to defend the action, in the name of the assignee, upon their indemnifying the assignee, and the same was to be tried in his majesty's court of Common Pleas in London; and it was ordered that all proceedings under the said commission should be stayed until further order. Gregory, in pursuance of, and in obedience to the order, did, on the 17th May, 1821, commence an action of trover against Hurrill, his assignee, in his majesty's court of Common Pleas accordingly. On the 19th May, 1821, two days after the commencement of the action of trover to try the validity of the said commission, the attorneys for the petitioning creditors under the commission so issued against Gregory, fetched away from the secondary's or sheriff's office for London, the said three several writs of capias, alias, and pluries, so issued out against Hipkins and Gregory, in the year 1812 as aforesaid, with the returns so as aforesaid, indorsed on the said three writs. The said three writs were all filed together in the Record office in the court of King's Bench, on the 11th July, in the aforesaid year 1821, being the last day of Trinity term in that year, and a roll of the proceedings with the continuances on the writ of pluries brought down to the term next preceding the date of the commission so issued against Gregory, was docketed and carried in, and on the same day the said three writs were so filed of record,

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which, in point of fact, was the day next before the day appointed for the trial of the action of trover, and only two days before such trial actually took place. The action of trover came on for trial before the Lord Chief Justice of the court of Common Pleas, and a special jury, at Guildhall, on the 13th July, 1821, when the said J. T. Taylor, and J. Parker, as such petitioning creditors as aforesaid, proved the trading and act of bankruptcy of Gregory; and when they also, by the production of certain documents, and the testimony of Walsh, established a debt of 14771. 11s. 6d., due to them as such assignees as aforesaid, for and on account of the several advances so as aforesaid made by Walsh. Whereupon Gregory adduced as evidence S. Hatch, the clerk of Mr. Iggulden, the Viceconsul of Sweden, resident at Deal, who identified Gregory as being a person who, in the month of April, 1814. had called at the office of the said Vice-consul at Deal. several times, whilst waiting for a passage in the ship Hazard. He left a letter with the witness, to be delivered to the captain of a ship called the Aurora, and Gregory waited there several days, which letter was given in evidence at the trial, and is as follows, viz: "Downs, 21st April, 1814. Captain M. F. Bohl, you will proceed from hence with all dispatch to the port of Amsterdam with your cargo, waiting my further orders in regard of the same. Your obedient servant, G. B. Gregory. P. S. As all privateers are called in, there is no occasion for convoy." Addressed, "Captain M. F. Bohl, Swedish schooner Aurora, care of E. Iggulden, esq., Deal (expected in the Downs hourly from Portsmouth)." The testimony of the said S. Hatch was the only evidence offered by the said bankrupt of his having been in England from the year 1811, till the year 1819; whereupon Taylor and Parker, the assignees of Walsh, produced one Martha Salter as a witness, who stated that she knew the said G. B. Gregory in Sweden, in 1815, and that she had seen him in England, at the house of Mr. Pattrick, in the year

1819, when he said that he had sailed from England in the year 1811, and returned in 1819; and that she had also heard him say in the presence of his sisters, that he had never been in England during the whole seven years, and that she thought she had heard him say so more than And the assignees of Walsh also produced and put in evidence at the said trial, examined office copies of the aforesaid writs of capias, alias, and pluries, and returns indorsed thereon, and also an examined office copy of the roll of proceedings with the continuances so entered thereon. The Lord Chief Justice thereupon directed the jury to find a verdict for the plaintiff Gregory, reserving the point for the consideration of the court of Common Pleas as to the effect of the continuances so as aforesaid entered on the roll, and whether the same were sufficient to take the case out of the Statute of Limitations.

The case then shortly set forth the proceedings in the cases of Taylor v. Hipkins (a), Gregory v. Hurrill (b), and Gregory v. Hurrill (c).

On the 8th July, 1823, Gregory preferred another petition to the Lord Chancellor, thereby stating that, notwithstanding the opinion of the Judges of the court of Common Pleas, he was advised that the debt of the petitioning creditors, if any, was really and actually barred by the Statute of Limitations, and was not a valid debt at the time of issuing the said commission against him to support such commission. Upon the hearing of the last-mentioned petition, his Lordship was pleased to order that a case should be stated for the opinion of his majesty's court of King's Bench upon the following question: "Whether, under the circumstances stated, the said J. T. Taylor, and J. Parker, as assignees of the estate and effects of Walsh, who were the petitioning creditors under the commission of bankrupt awarded and issued against Gregory, had, at the time of suing out the said commission 1826.
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<sup>(</sup>a) 5 B. & A. 489. (c) 1 Bing. 324; 8 J. B. Moore,

<sup>(</sup>b) 3 B.&B. 212; 6 J. B. Moo. 525. 189.

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Campbell, for the plaintiff. It is submitted that under the circumstances stated in this case, the assignees of Walsh had not a valid petitioning creditor's debt, to support the commission awarded against the plaintiff, inasmuch as the debt claimed to be due for that purpose was barred by the Statute of Limitations at the time the commission was sued out. This objection certainly would not lie in the mouth of a third person, if the bankrupt had submitted to the commission; but it is a clear proposition, that the bankrupt himself may take advantage of it, Swayne v. Wallinger (a), Quantock v. England (b). Wherever a debt, barred by the Statute of Limitations, is proved under the commission, it is the universal practice - for the Lord Chancellor to order the proof of such a debt to be struck out, Ex parte Dewdney (c), and Ex parte Roffey (d). It cannot be said that the debt in question comes within the exception of the Statute of Limitations, concerning merchants' accounts; for this is not a debt arising between merchant and merchant: it is merely an

<sup>(</sup>a) 2 Stra. 746.

<sup>(</sup>b) 5 Burr. 2628.

<sup>(</sup>c) 15 Ves. 479.

<sup>(</sup>d) 2 Rose B. C. 245.

advance of money by way of loan. There were no mutual dealings between the parties, and it has been expressly determined that the exception in the Statute of Limitations applies only to the case where there are mutual dealings; Barbor v. Barbor (a), Foster v. Hodgson (b), and Catling v. Skoulding (c). In the latter case, some expressions are attributed to Lord Kenyon, which will probably be referred to on the other side, but they do not militate against the general principle. The question then is, whether Gregory was in parts beyond seas until within six years of the commencement of the suit against him in 1821? Admitting that the defendant did not know of his being at Deal for a few days in 1814, still that makes no difference, for neither the statute 21 Jac. 1, c. 16, nor the 4 Anne, c. 16, s. 19, contains any thing to shew that the presence of the debtor in England should be known to the creditor in order to make the time begin to run; for it is a settled principle, that when once the statute begins to run, nothing can stop it. Then, when did the statute begin to run? It began to run from the day on which Gregory first set his foot on shore. The statute 21 Jac. 1, c. 16, applies to the absence of the creditor beyond seas, and the 4 Anne, c. 16, to the absence of the debtor; but the same construction is to be given to both, as to the effect of the return of the party to England, and therefore the return from beyond seas, though but for a day, will make the statute run in either case. The length of the party's stay in England has nothing to do with the question as to the operation of the statute. The moment he lands on the English

shore, that is to be considered as his first return, though it does not appear for what length of time he stays. Suppose a plaintiff returns from beyond sea but for a day, and goes abroad again immediately, the exception in 21 Jac. 1, does not help him, for the statute runs from that moment, and continues to run; Smith v. Hill (d), Doe v. Jones (e).

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<sup>(</sup>a) 18 Ves. 286.

<sup>(</sup>d) 1 Wils. 134.

<sup>(</sup>b) 19 Ves. 179.

<sup>(</sup>e) 4 T. R. 300.

<sup>(</sup>c) 6 T. R. 189.

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If that be law for a plaintiff, it must equally be so for a defendant. The exception in 4 Anne, c. 16, will therefore not avail the present defendant, because it follows as the converse of the proposition respecting plaintiffs, that the statute had begun to run when Gregory landed at Deal, although he went abroad again immediately. question then is, whether there were regular continuances of the original action, at the time the docket was struck, so as to take the case out of the statute. It cannot be denied by the plaintiff, that if there had been an action regularly commenced and continuances entered up, the creditor ought not to be prejudiced by the debtor going abroad; but here there has been no regular continuance of the original process. The writs sued out in 1812 and 1813, can avail the defendant nothing; because, though returned non est inventus by the sheriff, they were not returned and filed until after the commission of bankrupt had issued; and it is expressly found by the case, that the roll was not carried in and continuances entered until two days before the trial in the Common Pleas. It is not necessary to argue the doubtful question, whether a commission of bankrupt can be a good continuance of a capias; but if it were, the case of Smith v. Bower (a), would in principle negative that proposition, for it was there held that an attachment of privilege is not a continuance of a bill of Middlesex so as to avoid the statute. It is sufficient for the present purpose to rely upon the fact, that here the writs originally sued out were never returned, and consequently the statute is not avoided, Brown v. Babbington (b); and in Harris v. Woolford (c), it was held that in order to save the statute it is necessary to shew not only that the writ was sued out in time, but also that it was returned into Court, because the Court is not in possession of the suit until the writ is returned. In Bates v. Jenkins, cited

<sup>(</sup>a) 3 T. R. 662.

<sup>(</sup>c) 6 T. R. 617.

<sup>(</sup>b) 2 Ld. Raym. 880.

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by Lord Kenyon, in Harrisv. Woolford(a), Mr. Justice Buller said, [speaking of the commencement of a suit, in order to avoid the statute]: "If the first writ had been sued out, and kept in the plaintiff's pocket, there might have been great objection, but not any when returned of record, and not merely indorsed by the sheriff," and on that ground it was held that the plaintiff should have shewn that the first writ had been returned. The consequence resulting from these authorities is, that Gregory has been improperly adjudged a bankrupt, because the commissioners had not sufficient facts before them to warrant their adjudication. To support the commission there must be a good petitioning creditor's debt. Now prima facie the petitioning creditor's debt was bad, for at the time the docket was struck and the commission issued, there had been no return of the writs, nor any entry of continuances. The adjudication of the commissioners, therefore, was wrong, and the commission ought to have been set aside. The validity of the commission must depend upon the sufficiency of the petitioning creditor's debt in point of law, and looking at the facts in this case, it is clear that there was no legal proof that Gregory was indebted to the petitioning creditor, inasmuch as there was no formal entry of the writs and continuances thereon. The party who is to be affected by a proceeding in bankruptcy, is entitled de jure to have the most satisfactory evidence of the validity of the debt by which the commission is sought to be supported. will hardly be disputed on the other side, that if Gregory had been in the first instance improperly adjudged a bankrupt, and he had been indicted for not surrendering to the commission, the prosecution must have failed (b). Then if that be so, can it be contended that the commission could be set up by the subsequent return of the writs and entry of continuances, so as to subject the party to prosecution for a capital offence, by ex post facto

<sup>(</sup>a) Id. 619. See Beardmore v. vol. i. 27.

Rattenbury, 5 B. & A. 452. Ante, (b) Rex v. Bullock, 1 Taunt. 71.

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evidence? The effect of such a proposition would be to render the party liable, or not liable, to prosecution, according to the good will and pleasure of the sheriff, who cannot be compelled to return the writ, unless ruled to do so within six months after he is out of office. would be of the last importance in such a prosecution, for the party accused to shew the true day on which the writs were returned, and continuances entered; and it is clear that evidence for that purpose would be admissible; Moons v. Pugh (a), Wilson v. Girdlestone (b), Lyttleton v. Cross (c). Suppose there had been an indictment against Gregory, under the 5 Geo. 2, c. 30, for not surrendering to his commission within 42 days, must he not have been acquitted if it appeared that the writs were not returned, and continuances entered, until after the indictment was preferred? Would the grand jury, indeed, be justified in finding a bill, unless there was sufficient evidence before them to take the petitioning creditor's debt out of the Statute of Limitations, before the bill was preferred? Here, at the time that Gregory was adjudged a bankrupt, the facts had not taken place, which were necessary to found the adjudication of the commissioners, and consequently the commission was invalid to all intents and purposes. If it would be insufficient to sustain a criminal proceeding, it would be equally inoperative to sustain a civil action. There could not have been a good petitioning creditor's debt, unless it was sufficient to support an indictment against the bankrupt for felony; and it follows as a necessary consequence, that there could not have been a good petitioning creditor's debt for any purpose,

Denman, contrà. This was a good commission, and may be sustained, if not for criminal purposes, at least for all civil purposes, in order to do justice to the creditors of

<sup>(</sup>a) 3 Burr. 1241. (c) Ante, vol. v., 175. 3 B. & (b) 5 B. & A. 847. Ante, vol. i., C. 317.

the bankrupt. First, it is submitted that the debt in question arose between merchant and factor, and if so, then it comes within the language of 21 Jac. 1, c. 16, s. 3, which excepts "such accounts as concern the trade of merchandise, between merchant and merchant, their factors or servants." From the facts stated in the case, it appears clear that Walsh was factor or servant to Hipkins and Gregory, for it is expressly found, that by the agreement between the parties, he was employed as broker, to answer the purposes of the speculation; and that he thereupon agreed to become the agent of the concern upon the usual terms of interest, and a certain commission being allowed upon the amount of all advances and payments made by him in the course of such agency, and that the proceeds of the cargo were to be remitted to him for the payment of such advances; that various goods were purchased, and the different merchants and tradesmen were referred to him, who either paid in cash or accepted bills of exchange for the amount; and that he continued to pay he bills so accepted by him on account of the goods shipped, &c. This, then, is one of the cases excepted out of the statute; and therefore, inasmuch as both before, and at the time, when this debt was contracted, Walsh was employed by Gregory and Hipkins as their factor, in settling the accounts of the concern, the statute does not run as against the debt in question. The accounts need not be mutual, so as to bring the case within the exception in the statute, for so long as they are merchants' accounts, that is sufficient, according to the opinion of Lord Kenyon, as reported in Catling v. Skoulding (a). The statute itself says nothing about mutual accounts, and Lord Kenyon, in the case referred to, observes that, "where there is no item of account at all, within six years before the action brought, the plaintiff will be precluded, unless he can bring his case within the exception in the statute concerning merchants' accounts; and it must be remembered

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(a) 6 T. R. 192.

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that there the plaintiff is not barred, though there has been no transaction of any kind between the parties for six years; for by his replication, he insists that his case never was within the statute, for that the accounts were between merchant and merchant." [Bayley, J. But Lord Kenyon notes a distinction between that case and former cases, where there were items only on one side of the accounts, and he pointedly observes, that in the case then at bar, there were mutual items of account]. In that case Lord Kenyon reviews the language of the statute, and it is plain that in his view of a case similar to the present, there could be no doubt that he would hold it within the plain words of the exception. Secondly, assuming the judgment of the Court to be unfavourable to the defendant on this point, it is submitted that there was no such return of the debtor Gregory, from beyond seas, in 1814, as required the assignees to take proceedings against him earlier than 1821. Now there is considerable doubt upon the point, whether Gregory did in fact return to England in 1814, for the case sets out the evidence on both sides, and leaves this Court to draw its own conclusion from the circumstances so stated; but admitting the fact, that Gregory had landed for a few days at Deal, in 1814, still it is contended that this would not be such a returning from parts beyond seas, as is contemplated by the statute 4 Anne, c. 16, s. 19. The return there contemplated is a permanent return, with an intention of staying at home, · and not a casual or accidental visit, such as is stated in Beside, it must be a return which is known to the creditor, whose interests are to be affected, or rights barred, by the fact of the return. The hardship of the proposition contended for on the other side, may be fairly tried by this test: suppose a person goes abroad, and during his absence from England a right of entry on a freehold estate descends upon him, but he happens accidentally to touch on the coast, and being ignorant of his rights, pursues his voyage, and suffers twenty years to elapse before his return,

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could it be contended, under such circumstances, that he would be barred by the Statute of Limitations? Surely not: and yet the affirmative of such a proposition must be made out, before the assignees in this case can be concluded by the fact of Gregory's having accidentally returned for a temporary purpose. Thirdly, supposing the statute began to run in 1811, when Walsh became bankrupt, then comes the really important question in this case, viz. whether the writs issued in 1812 and 1813, were properly continued so as to take the case out of the statute. This point has in effect already undergone three judicial determinations, in Taylor v. Hipkins(a), Gregory v. Hurrill(b), and Same v. Same (c). There can be no doubt that the writs so sued out were duly returned, for the case finds that fact; and then the conclusion follows from the decisions referred to, that continuances had been properly entered so as to save the Statute of Limitations. As to the objection that a commission of bankrupt cannot be considered as a valid continuance of the original proceedings, Richardson, J., lays down a plain and intelligible principle (d), which is a decisive answer to the argument on the other side, namely, that "As long as a remedy was open to the party, by which the debt might have been recovered any where, it was not barred by the statute." But then it is said that the commission in this case would not support a criminal proceeding against the bankrupt. Assuming that to be so, still there are cases which decide that some proceedings may be good for ordinary civil purposes, though not so where the . life of the party is affected; Bones v. Booth (e), and Rex All that is necessary to make out here v. Punshon (f). is, that the commission is good for the purpose of distributing the bankrupt's effects amongst his creditors, and it

<sup>(</sup>a) 5 B. & A. 489.

<sup>(</sup>d) Gregory v. Hurrill, 3 B. & B.

<sup>(</sup>b) 6 J. B. Moore, 525. 3 B. 212. 6 J. P. Moore, 525.

<sup>&</sup>amp; B. 212.

<sup>(</sup>e) 2 Sir W. Bl. 1226.

<sup>(</sup>c) 8 J. & B. Moore, 189. 1

Bing. 324.

<sup>(</sup>f) 3 Campb. 96.

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is not incumbent on the defendant to shew that upon an indictment of felony the plaintiff could be convicted. It is said that the commission might be defeated by shewing the true day on which the writs were returned, and continuances entered. This might be so in a criminal proceeding, but non constat that it would avail the party in a civil action. On these grounds, therefore, first, that this debt is within the exception in the statute as to merchants' accounts; second, that there was no return from parts beyond seas within the meaning of the statute 4 Anne; and third, that there were proper continuances upon the return to the writs originally sued out: this is a valid petitioning creditor's debt, and the defendant is entitled to judgment.

This case was argued in *Michaelmas* term, 1825, and the Judges afterwards sent the following certificate into Chancery:—

"This case has been argued before us by counsel, and we are of opinion, that, under the circumstances stated, the said J. T. Taylor and I. Parker, as assignees of the estate and effects of the said B. Walsh, who are the petitioning creditors under the said commission of bankrupt awarded and issued against the said G. B. Gregory, had not at the time of suing out the said commission of bankrupt, viz. on the 22nd day of March, 1821, or on the 9th day of April, 1821, when the said G. B. Gregory was declared a bankrupt, a valid debt, as petitioning creditors, to support the said commission.

- С. Аввотт.
- J. BAYLEY.
- G. S. HOLROYD.
- J. LITTLEDALE."

## DICKINS v. SMITH and JARVIS.

THIS was a rule nisi for an attachment against the plaintiff for non-payment of costs, pursuant to the Master's ters in differallocatur, under the following circumstances. The plain- ence, between tiff had brought an action of assumpsit against the defendants, to which they separately pleaded non-assumpsit. The cause, and all matters in difference, were afterwards of Nisi Prius referred to an abitrator by an order of Nisi Prius, which with power to provided, that the costs should abide the event, and that the arbitrator should have power to enlarge the time for making his making his award, by indorsement on the order of Nisi Prius. The arbitrator enlarged the time twice, and finally the order of made an award, "that there is nothing due to the plain-The defendant Jarvis did not appear when the the event. The cause was called on for trial, nor did he attend before the Upon the award being taken before the Master, he taxed the costs of the cause and of the reference to the defendant Smith, who demanded them of the plaintiff, pursuant to the Master's allocatur. The amount given reference, and by the Master was 56l., and he made no distinction between the costs of the cause and those of the reference. The plaintiff refused to pay the costs, upon which the defendant Smith made the order of Nisi Prius, and the arbitrator's indorsements thereon for enlarging the time fore the arbifor making the award, a rule of Court, and then moved for the present rule. The affidavits produced on the thecosts of the motion, stated only that copies of the award, the Master's allocatur, and the rule of Court, had been served upon the one sum, to plaintiff; they did not go on to state that the time for fendant, who

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A cause. and all mata plaintiff and two defendants, were referred by order enlarge the time for award by indorsement on reference; the costs to abide arbitrator did enlarge the time for making his award, by indorsement on the order of awarded "that there is nothing due to the plaintiff." Only one of the defendants attended betrator. The Master taxed cause and the reference in that one demade the order

of reference, with the arbitrator's indorsement thereon, a rule of Court, and demanded the costs from the plaintiff, who refused to pay them: -Held, First, that the award determined the right of action between the parties, and was sufficiently final. Second, that the rule of Court was a sufficient foundation for an attachment for not performing the award, without an affidavit that the time was duly enlarged. And, Third, that an attachment would not be for the non-payment of the costs to the one defendant only. Semble, that the Master had not power to tax the costs separately to the several defendants.

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making the award was duly enlarged, or that any affidavit of that fact was shewn to the plaintiff.

C. Cresswell shewed cause. This rule must be discharged upon three grounds. First, it was obtained without any affidavit that the time for making the award had been duly enlarged, which is a fatal objection; Halden v. Glasscock (a). It was there expressly decided, that if a cause is referred by a judge's order, by consent of the parties, and the time for making the award is enlarged by a judge's order, on moving for an attachment for not performing the award, it must be shewn that the order enlarging the time was made by consent: and Holroyd, J., said, "To bring the party into contempt, at least it must be shewn that the enlargement of the time was by consent. original order enabled the arbitrator to enlarge the time by indorsement; but there is no affidavit that he did so enlarge it." Second, the award itself cannot be enforced, for it is not final, and does not determine the cause in favour It states only "that there is nothing of the defendants. due to the plaintiff," but it does not state that there was nothing due to him when he commenced his action. Third, the action being joint against two defendants, the costs cannot be awarded to one of them only. They both pleaded to the action; the award was general, in favour of both; and the judgment, therefore, would be joint: whereas the Master has not taxed the costs separately to each, but has taxed the whole to one, which he has no authority to do; for where a plaintiff fails in an action against several defendants, he cannot be compelled to pay costs to any one of them singly, but may elect to pay to which of them he pleases; Jordan v. Harper (b), Duthy v. Tito (c).

D. F. Jones, contrà. Neither of these objections is well

<sup>(</sup>a) Ante, 151. 5 B & C. 390.

<sup>(</sup>c) 2 Str. 1203.

<sup>(</sup>b) 1 Str. 516.

founded. First, it is quite clear that the enlargement of the time for making the award would not have been made part of the rule of Court, unless an affidavit that it was duly made had been produced in support of that motion; consequently, it was perfectly unnecessary to produce such an affidavit a second time, upon moving for the present Second, the award is sufficiently final; for as there is nothing to shew that there were any matters in difference between the parties, except the action itself, the expression "there is nothing due to the plaintiff," could only mean, "the plaintiff is not entitled to recover in the Third, the form of the taxation is perfectly correct, for as the defendant Smith was the only person who incurred the expense of appearing to the action, and of attending before the arbitrator, he was the only person to whom the costs could with justice or propriety be awarded.

BAYLEY, J.—I am of opinion that the first two objections are unfounded, and that the attachment might have been granted against the plaintiff, but for the third objection, namely, to the mode in which the costs have been taxed and demanded. I take it to be clear, that where a submission to arbitration contains a power of enlarging the time for making the award, and the enlargement is made a rule of Court, that rule of Court is a sufficient foundation for an attachment, without an affidavit of due enlargement; the same as if the award had been made within the time originally limited for that purpose. The present case is different from that of Halden v. Glasscock (a), for there the time was enlarged by a judge's order, which for anything that appeared might have been made without the consent of the parties; and if so, it was an order made proprio vigore judicis, not proving the enlargement to be duly made, and not binding upon the

parties. But here the enlargement appears to have been (a) Ante, 151. 5 B. & C. 390.

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made with the consent of the parties, and it must be presumed that the Court were furnished with the proper affidavits, when they made it a rule of Court, for else every rule for an attachment for disobeying a rule of Court. must be a rule nisi only. I am also of opinion that the award, finding " that there is nothing due to the plaintiff," is sufficiently final, and does determine the right of action at the time when the submission was made; because, it must, I think, be presumed, in the absence of proof to the contrary, that the question between the parties remained the same from the time of making the submission, to the time of making the award. The difficulty that I feel is upon the third objection. It appears that the whole of the costs, both of the cause and of the reference, have been taxed together, to the defendant Smith only, at the sum of 561. By the submission, the costs were to abide the event; and the event being in favour of the defendants generally, the costs would accrue to them both jointly, or to each separately: for though the defendant Smith might be entitled exclusively, to the costs of the reference, both might be entitled jointly, or each separately, to the costs of the cause. Whether, under the circumstances of this case, there could be separate judgments, and a separate taxation of costs, to each, I am not prepared to say; I entertain great doubt upon that point; I do not remember to have met with such a case, and I believe the general course has always been to tax all the costs jointly against the plaintiff, and to leave it to the defendants to arrange the distribution of them among themselves. If there could be separate judgments for the costs, the plaintiff would of course be liable to separate executions, which would be a great hardship upon him. But supposing the costs could be so taxed, still I doubt very much whether there has been such a taxation in this case, as entitles the defendant Smith to demand the costs exclusively for himself. If the costs of the reference had been taxed separately from those of the cause, the defendant Smith might have demanded the

former for himself alone, and the latter for himself and the other defendant jointly. But it seems plain, upon this allocatur, that the sum of 56l. includes all the costs, both those of the cause and those of the reference; and though the defendant Smith claims to have the whole of that sum from the plaintiff, he does not inform us upon affidavit that no part of the costs has been already paid to the defendant Jarvis. Under such circumstances of doubt. I think we ought not to make the rule for an attachment absolute. Even if the costs had been awarded separately to the several defendants, the power to do so is so very questionable, that we should scarcely have been warranted in granting an attachment, for the plaintiff ought to have the opportunity of raising the question upon the record. It seems to me, therefore, that this rule must be discharged. No ultimate injustice will be worked by this decision, for if the defendant Smith is entitled to the costs that have been taxed, he may bring an action to recover them.

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HOLROYD, J.—The right of the defendant Smith, to these costs, is far too doubtful for us to say, that the plaintiff is guilty of a contempt for not paying them, and to grant an attachment against bim. The party must have recourse to his other remedy.

LITTLEDALE, J., concurred.

Rule discharged.

Helsby and others v. Mears, Tomlinson, Salis-BURY, and others.

ASSUMPSIT against defendants, as common carriers, for not safely carrying from Chester to Liverpool, and there by one of se-

A special contract made

coach proprietors for the carriage of parcels, is binding upon them all, though some of them became proprietors after the contract was made.

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delivering to plaintiffs, a box containing watch cases. Plea, non-assumpsit, and issue thereon. At the trial, at the Chester summer assizes, 1825, the case was, in substance, this:-The plaintiffs were watch case manufacturers at Liverpool. The defendants were the proprietors of the mail coach running between Liverpool and Chester. On the 15th September, 1824, the plaintiffs sent the box in question, containing gold and silver watch cases to the value of 1851., from Liverpool, to a Mr. Walker, the Assay Master, at Chester, for the purpose of the goods being On the following day, the same box, with the same contents, was delivered by Mr. Walker at the mail coach office, of which Mrs. Tomlinson was then the sole proprietor, directed to the plaintiffs at Liverpool. box never reached the plaintiffs, having been stolen out of the mail coach office at Chester. Previous to this transaction, the defendants had put up in their office a board containing a notice, that they would not be accountable for the loss or damage of any package or parcel exceeding the value of 51., unless the same were entered and paid for accordingly, at the time of its delivery to them or their agents. The box in question was not entered and paid for as being above the value of 51. Mr. Walker had for some years been in the habit of receiving boxes of the same kind from different persons, by different coaches of which Mrs. Tomlinson was the proprietor. About three years before this transaction, a box containing watch cases, which had been sent to him from Coventry for the purpose of being assayed, was lost, and upon his making application to Mrs. Tomlinson, who was then the proprietor of the Coventry mail, by which that box was sent, and also of the Liverpool mail, she paid him the value. Some conversation then took place, in the course of which Mrs. Tomlinson observed, that the proprietors incurred a great risk in carrying such valuable parcels as his, that the carriage was not equivalent to it, and that they must decline carrying them in future. Mr. Walker said, if that was

persisted in, there must be an end of all their other arrangements with him. She then said, "Is our carrying them any accommodation to you?" He answered, "Certainly; whatever accomodates the trade, accomodates me." rejoined, "If that is the case, we will continue to carry them as usual." The carriage then charged for the boxes containing watch cases, was the same as that charged for ordinary packages. After this conversation, Mr. Walker continued to send the boxes the same as before; and his mode was to settle the account for the carriage once a year; to pay the carriage to Chester himself, and afterwards to charge it to the different owners of the boxes. Some of the defendants did not become partners in the Liverpool mail, until after the above conversation between Mr. Walker and Mrs. Tomlinson took place, and Mr. Salisbury did not become a partner until after the last settlement of accounts between Mr. Walker and the then proprietors at Chester. Upon these facts, it was contended on the part of the defendants; first, that the conversation having reference to a different coach, was no evidence of a special contract to be accountable for the loss of parcels sent by the Liverpool mail, exceeding the value of 51., and not insured, even as against Mrs. Tomlinson; and that, at all events, it could not be evidence against such of the defendants as were not partners at the time; or against Mr. Salisbury, who only became a partner subsequently to the last settlement of the accounts: and second, that the loss being occasioned by a felony, and not by any negligence of the defendants, they were on that ground not liable to make it good. The learned Judge left it to the jury to say, first, whether there was a special contract to carry these boxes at the rate charged for ordinary parcels, without insurance; and second, whether the loss was occasioned by a felony, without any negligence on the part of the defendants. The jury answered both these questions in the affirmative, and thereupon a verdict was, by the learned Judge's direction, entered for the plaintiffs, with liberty to the defendants,

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to move to enter a nonsuit. A rule nisi was obtained accordingly in last *Michaelmas* term, against which

This verdict Temple and Parke now showed cause. cannot be disturbed. First; there was evidence of a special contract between Mr. Walker, the agent of the plaintiffs, and Mrs. Tomlinson, the original proprietor of the coach, to carry the parcels sent by him at the ordinary rate of carriage, notwithstanding the notice. She paid for the loss of the first parcel; she then objected to go on upon the old terms, declaring that the carriage was not equivalent to the risk, but finally agreed to do so, saying "we will continue to carry the boxes as usual:" and the very circumstance which gave rise to the conversation, clearly shews that she thereby meant that she would continue to be responsible for the boxes, independently of the notice. The loss in question happened, it is true, from a different coach, travelling a different road, but as she was then the proprietor of several coaches, by all of which Mr. Walker was in the habit of sending boxes, it is plain that the course of dealing between them, and their conversation, regarded the question of general responsibility, and not of responsibility as to parcels sent by any particular coach. Secondly, all the defendants are bound by this special contract, with respect to all the coaches of which Mrs. Tomlinson was a proprietor. Mr. Walker could not possibly tell who were her partners in business, and she evidently spoke of the whole firm, when she said We will continue to carry as usual. The annual settlement of accounts subsequently to the formation of the special contract, is evidence of the adoption of that contract by such of the partners as joined the concern previous to the last settlement; and it is evidence of its adoption by Mr. Salisbury also, because he never expressed his dissent or disapprobation. It is a settled rule of law that a new partner coming into a firm is bound by all the equities attaching upon it at the time, and is to be considered as recognising and adopting the course of dealing

and business which then subsists. If he disapproves of it, he must give notice of his dissent; and if he gives no such notice, he still remains bound. That was laid down as law by Lord Kenyon, in Stracey v. Decy, cited in a note to George v. Clagett (a), and has never been disputed. The special contract, therefore, supersedes the notice, and leaves all the defendants open to their common law liability. Third, even if there were no special contract, the defendants are still liable, for as they knew the value of the package, and suffered it to be stolen, that is of itself an act of negligence, for the consequences of which they are responsible.

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Cross, Serjt., and J. Williams, contra. The conversation between Mr. Walker and Mrs. Tomlinson, even if it amounted to a special contract as between them, is not evidence to affect those who were not partners in the concern at the time when it took place. It had no reference to the particular coach by which the parcel in question was to have been carried; and for all that appears, the loss might have happened under circumstances which rendered Mrs. Tomlinson liable on the ground of negligence. There is no evidence to shew that the notice had been put up before that time, and if it had not, the plaintiffs, or their agent, Mr. Walker, who knew of the notice, must be taken to have acted upon the terms specified by the notice. Upon the other point, as the jury have found expressly that the box was stolen, and that there was no negligence on the part of the defendants, the cases in which it has been held that negligence supersedes the notice, do not apply, and the defendants are within the protection of their notice.

BAYLEY, J.—It seems to me that this rule ought to be discharged. It is quite clear that a carrier may limit his common law liability by a general notice, that he will

(a) 7 T. R. 361.

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not be accountable for parcels exceeding a certain value; but he may, nevertheless, bind himself by a special contract entered into with a particular individual. Now the conversation between Mrs. Tomlinson and Mr. Walker, if believed, might, in my opinion, very naturally induce the jury to think, that she then engaged to carry all parcels sent by Mr. Walker, as Assay Master, by any of the coaches of which she was a proprietor, at the ordinary rate of carriage. The jury seem to have formed that opinion in fact, and it seems to me that that conversation established a special contract, of the nature I have mentioned, in law; and if so, I feel no difficulty in saying, that such a contract would bind, not Mrs. Tomlinson only, but all those who either were her partners at the time, or became so afterwards, until they gave Mr. Walker notice that they intended to rescind that contract, and to adopt a different course of dealing for the future. not distinctly in evidence at what period the notice was put up. If it was put up before the conversation with Mrs. Tomlinson, that conversation would take the whole transaction out of the operation of the notice. If it was put up subsequently to the conversation, still it was the duty of Mrs. Tomlinson, if she intended the notice to vary her course of dealing with Mr. Walker, to make him acquainted with that intention: and her omitting to do so, is very strong evidence to shew that she understood the original contract to be subsisting, unaltered by the notice. For these reasons, I am of opinion that the verdict which has been found for the plaintiffs, ought not to be disturbed.

HOLROYD, J., concurred.

LITTLEDALE, J.—I cannot say that the verdict is wrong in point of law, but at the same time I cannot help feeling that this is a case of some hardship upon the defendants.

Rule discharged.

## GRAZEBROOK and another v. DAVIS.

DECLARATION in debt on bond. Pleas, first, non est conduct of an factum, craving over of the bond, and setting out the condition, which, (after reciting that differences had arisen award, withand were then depending between the plaintiffs and the defendant, and an action at law having been commenced in the court of King's Bench by the plaintiffs against the bring forward defendant, and the parties being at issue therein, and the cause being set down for trial, in order to put an end to cannot be such differences, and to avoid the expense of proceeding to the trial of the cause, the parties had agreed to submit on the bond, all matters in difference to the arbitration of A. B., who was to examine the witnesses to be produced by the parties, upon oath, &c.), was for the performance of the award of the arbitrator to be made on or before the 8th November, then next. Second, that the arbitrator in the sion is, that the condition of the bond mentioned, after the making thereof, to wit, on the 26th July, 1824, took upon himself the burthen of the reference, and afterwards, and between the making of the said supposed writing obligatory, and the 8th November next ensuing the date thereof, being the time limited day thereby appointed for making his award, made divers, to wit, six appointments for proceeding with the reference, to wit, on &c.; and on those days examined divers, to tion of the wit, five witnesses, brought forward to the arbitrator to plaintiff's witbe examined touching the matters referred, by and on behalf of the plaintiffs, and occupied the whole of the time of the said meetings respectively in so doing. That at the last of the said meetings, to wit, on the said 8th November, 1824, the plaintiffs closed their case before the arbitrator, and the defendant was then called upon by the arbitrator to enter upon his defence. That at the time the plaintiffs closed their case before the arbitrator, a short and insufficient time, and not a reasonable or proper time, to wit, twelve hours only, remained for the defendant to bring

Improper arbitrator, in making his out allowing the defendant further reasonable time to and examine his witnesses, pleaded in bar to an action conditioned for the performance of the award ; though one of the terms of the submisarbitrator shall examine the witnesses to be produced by the parties, and though the whole of the for the making of the award is occupied in the examinanesses.

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forward and examine his witnesses before the arbitrator upon the merits of his case, and the defendant then requested the arbitrator to allow him further and reasonable time to enable him to bring forward and examine his witnesses, which the arbitrator refused to do without the consent of the plaintiffs; and which consent the plaintiffs, although requested by the defendant, refused to grant, and the arbitrator altogether refused to allow the defendant any further or reasonable time to bring forward his witnesses to be examined before him, the arbitrator; although the defendant had divers, to wit, four material witnesses, to bring forward and examine on his part and behalf, of which the arbitrator and the plaintiffs had notice. And thereupon the defendant afterwards, to wit, on the said 8th November, 1824, by deed, revoked his said submission, and afterwards, and before the arbitrator made his award, gave him due notice thereof. Demurrer to this plea, and joinder in demurrer.

Campbell, in support of the demurrer. The plea is clearly bad. It admits that there has been a revocation of the submission, and there are no circumstances under which a party to an arbitration bond can reserve to himself the power of revoking his submission, without imcurring the penalty of the bond. In the Year Book, 5 Ed. 4, 3 b, cited in Vynior's case (a), and in Warburton v. Storr (b), this case is put:—"If I am bound to stand to the award which J. S. shall make, I cannot discharge that arbitrament, because I am bound to stand to his award." If an award had been made, and an action had been brought, upon the bond, for not performing the award, a plea impeaching the award would have been bad. "To an action of debt on bond for not performing an award, or to an action on the award itself, the defendant cannot plead collusion, or other misconduct, of the arbitrators, in avoidance of the award. And there seems to

<sup>(</sup>a) 8 Rep. 162, 3d Resolution. (b) Ante, vol. vi., 214; 4 B. & C. 163.

be no case or dictum where a plea of this sort has been held to be pleadable: ner a precedent of such a plea to be found in any of the books of Entries. But on the contrary, in Willis v. Maccormick (a), it is said, that there is no case in which this matter has ever been pleaded"(b). It has been recently held by the court of Exchaquer, that a revocation of a submission, not under seal, before award made, is a breach of an agreement to stand to, abide, and perform an award; Brown v. Tanner (c); and upon the same principle it seems clear, that the revocation in this case was a breach of the condition, and worked a forfeiture of the penalty of the bond.

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G. R. Cross, contrà. It is by no means an invariable rule, that a revocation of the submission constitutes a breach of the condition of an arbitration bond; Curtis v. Potts (d). It was, indeed, there held, that to debt on an award made by arbitrators upon a submission to them generally, without any time, a plea that they did not make any award within a reasonable time, was bad; but Lord Ellenborough said, "It was open to the parties to this agreement to have requested the arbitrators to proceed within a reasonable time; and if after such request the arbitrators had neglected or refused, they might have revoked their authority." Now that must mean, that such a revocation would have been legal and valid for all purposes, and would have protected the parties making it from an action; and if the not making an award, within a reasonable time after request, would be a good ground for revocation, surely the refusing to examine witnesses, after request, would be a good ground also. The dictum cited from Serjeant Williams's note to 1 Saunders, is not altogether correct; for Mitchell v. Staveley (e) is an autherity to shew, that to an action of debt on bond, for not

<sup>(</sup>a) 2 Wilson, 148.

<sup>(</sup>d) 3 M. & S. 145.

<sup>(</sup>b) 1 Saund. 327, n. 5.

<sup>(</sup>e) 16 East, 5.

<sup>(</sup>c) 1 M°C. & Y. 464.

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performing an award, the defendant may plead the misconduct of the arbitrator. It was one of the terms of the submission here, that the defendant's witnesses should be examined; but they were not examined: and the plaintiff having himself occupied the whole of the time limited for making the award, refused to consent that further time should be allowed to the defendant.  $\lceil Bayley, J.$ not clear that the whole of the time was occupied by the plaintiff; the defendant may have contributed to exhaust the time, by long cross examinations of the plaintiff's witnesses, and by various other means]. Still, that would arise incidentally out of the plaintiff's case, and the consumption of the time must be attributed to him; and if so, that would be a justification of the defendant's conduct: as in the case of a feoffment on condition—if the feoffor, by his own act, renders the performance of the condition impossible, the non-performance of it by the feoffee becomes excusable. It was, indeed, held in Braddick v. Thompson (a), that partiality and improper conduct in an arbitrator, in making his award, without hearing the defendant and his witnesses, cannot be pleaded in bar to an action on the bond conditioned for the performance of the award; but is only matter for application to the equitable jurisdiction of the Court, to set aside the award.

BAYLEY, J.—The case last cited, is a decisive authority to shew, that a plea, like the present, is no answer to an action upon an arbitration bond. This is a very different case from that suggested, of a feoffment upon condition, for, in the present instance, the plaintiff has not committed any act to prevent the arbitrator from making his award, but the defendant has committed such an act, by revoking his submission. Besides, this plea is bad in form. It merely alleges, that the defendant had witnesses to bring forward and examine, which is not sufficient; it ought to have alleged, that he had his witnesses present before the arbitrator, and that he did all that it was in his

power to do, in performance of the reference on his part.

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HOLROYD, J.—I am of the same opinion. The plea is informal, and bad in all respects. It alleges a request of further time; but it does not state that evidence was laid before the arbitrator, shewing the necessity for such further time being granted.

LITTLE DALE, J., concurred.

Judgment for the Plaintiffs.

## LOGAN v. BURTON.

TRESPASS. First count for breaking and entering a certain close of plaintiff, called the Farm yard, in the parish of Egham, in the county of Surrey, abutting towards the west, on a public highway called Prune Hill Road, and towards the east on other closes belonging to Second count for breaking and entering a certain other close of plaintiff, called the Allotment, abutting towards the north in part on the Farm yard. Pleas; first, eved commisthe general issue, not guilty. Second, a public footway over both closes. Third, that defendant, at the time when, &c., was seised in fee of a messuage and closes called Bakeham House Farm, near the closes in which, &c., and that defendant, and all those whose estate he ingover other had in the said messuage and closes, immemorially had a footway for himself and themselves and servants, far- out the conmers and tenants, occupiers of the said messuage and two magiscloses from Prune Hill Road, towards and into, through, over, and along the closes in which, &c., unto and into stopped up the

A public footway passed over a common, into and across a farm-yard, into a public highway. A local act for enclosing the common, empowsioners to stop up roads over it, provided that they should not stop up any old road leadland not to be inclosed, withcurrence of trates. The commissioners public foot-

way over the farm yard, without the concurrence of two magistrates :-Held, that the public right of way over the farm-yard was not extinguished, for the concurrence of two magistrates was necessary, under s. 8, of the General Inclosure Act, 41 Geo. 3, c. 109, in order to extinguish the public right of way over the new inclosure, as well as that over the old.

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Rusham Green Road, towards and into the parish church of Egham, and from thence back again, &c. Fourth, a right of way by grant over both closes. Replications traversing all the rights of way, and issue thereon. At the trial, before Alexander, C. B., at the Surrey Lent assizes, 1824, the facts that appeared in evidence were these. The footway claimed by the defendant led eastward from Prune Hill Road, through the plaintiff's close, called the Farm yard, which was an old inclosure belonging to Rusham Farm; from thence over other lands of the plaintiff, which had in the year 1814, been allotted under an inclosure act, for inclosing lands in the parish of Egham, in the county of Surrey, to Mrs. Bartholomew, the then occupier of Rusham Farm, and from thence over other lands called Egham Field, and along a road called Egham Field Road, into Rusham Green Road. The award of the commissioners under the act, made no mention of the road over the Farm yard, but set out a footway from the east gate of Mrs. Bartholomew's farm yard, eastward, over the lands allotted to her and to other persons, into the Egham Field Road, for the use only of the occupiers of Bakeham House Farm, belonging to the defendant. Upon examining the Inclosure act and the award, the learned Judge was of opinion, first, that if there ever existed a public footway over the new inclosure, it had been extinguished by the award, and, therefore, that the public way claimed by the defendant, namely, a way over the plaintiff's closes into Rusham Green Road, did not exist; and second, that if the defendant, or his predecessor, had such a prescriptive right of way previous to the inclosure and award, that prescriptive right had been extinguished by the inclosure and award, and that the defendant, therefore, could claim a way only under the award: and the trespass being admitted, his Lordship accordingly directed a verdict for the plaintiff.

In Easter term, 1824, a rule nisi for a new trial was obtained, and at the sittings in Banc after Trinity term, 1824, that rule was argued. The Court being then of

opinion, that the learned Judge ought to have left it to the juty as a question of fact, to say, whether the defendant had a prescriptive right of way over the plaintiff's land, previous to the inclosure and award; because if he had, the award would confirm instead of extinguishing that right; made the rule absolute, upon these conditions: that the defendant should be at liberty to amend his pleas; and that if he did so amend, and proceeded to a second trial, he should pay the costs of the first trial, unless he made out a right of way as claimed in his original pleas.

The defendant having elected to amend, the following pleas were added.

First, that before the time when, &c., and before the passing of the Inclosure act, and the making of the award, there was a common and public highway leading from Prune Hill towards, into, through and over the said closes in which, &c., towards and into a certain other highway; that on the 17th June, 1814, the Inclosure act was passed; that on the 13th June, 1817, the commissioners under the act made their award, and thereby awarded that a footway commencing at the gate entering the Farm yard of plaintiff, and leading, eastward, over the allotment of plaintiff, into the Egham Field Road, should be set out for the use of the proprietors of Bakeham House Farm, belonging to defendant; that the footway so awarded to be set out, was a footway into, through and over the said closes in which, &c., in the same direction with the public footway thereinbefore mentioned; and that defendant being the proprietor of Bakeham House Farm, and having occasion to use the footway to pass and repass over the said closes, committed the said supposed trespasses. Replication, denying that the footway set out by the award was in the same direction with the public footway; and issue thereon. Second plea, similar, lonly claiming a private footway by prescription, and averring that it was in the same direction with the public footway. plication thereto, and issue thereon. Third and fourth LOGAN v.
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pleas the same, but pleaded to the first count only. Similar issues thereon. Fifth and sixth pleas, the same, but pleaded to the second count only. Similar issues thereon. At the second trial, at the Surrey Lent assizes, 1825, the jury found, that before the passing of the Inclosure act, and the making of the award, there was a public footway over the plaintiff's closes, but that there was no private way by prescription over them: and thereupon the plaintiff obtained a verdict, with leave for the defendant to move to enter a verdict in his favour, upon all or any of the issues, as the Court should direct.

Marryat, in Easter term, 1824, obtained a rule nisi to enter a verdict for the defendant on all the issues, except those which related to the rights of way claimed by grant or prescription, as appurtenant to the defendant's premises. The case was argued at the sittings in Banc, after Trinity term, 1825, by Barnewall for the plaintiff, and by Marryat and Chitty for the defendant. The former cited Rex v. The Commissioners of the Forest of Dean Inclosure (a), and White v. Reeves (b); and the latter, Harber v. Rand (c).

The Court took time to consider of their judgment, which was now delivered by

BAYLEY, J.—This case turned upon the construction of a private act of parliament, and of some not very distinct clauses in the General Highway Act. It was an action of trespass for breaking and entering one close called the Farmyard, and another called the alletment. The defendant justified under a private right of way by prescription or grant, which was negatived; and under a public right of way, which was found for him: but the public right was stated in two ways, namely, first, as continuing down to the time of the trespass; and, second, as continuing a public road down to the passing of an inclosure

<sup>(</sup>a) 2 M. & S. 80.

<sup>(</sup>b) 2 J. B. Moore, 23.

<sup>(</sup>c) 9 Price, 58.

act of the 54 Geo. 3, and from that time being converted from a public into a private road; and as certain costs depend upon which of these is the subsisting road, it is necessary to decide that question.

The closes are in the parish of Egham, and one of them was inclosed under the 54 Geo. 3, c. 153, intituled, "An Act for inclosing lands in the parish of Egham, in the county of Surrey." The other is a farm yard, and was an old inclosure long before the passing of that act. Before the passing of that act, there was a public footpath from Egham over the uninclosed lands into and through the farm-yard. The farm yard opened on the opposite side into a common road. The commissioners under the Inclosure act, set out what had previously been the public footpath over the land, to be inclosed as a private way over the plaintiff's farm; and whether this put an end to the public foot path over the allotment, and also over the farm yard, was the point in question. It was contended, for the defendant, that the public way continued ever both, the concurrence of two magistrates being, as the defendant's counselinsisted, essential to stop it up, and prevent its continuing a public road, and there having been no such concurrence. For the plaintiff, it was insisted, that the public way was at an end as to both; or, at least, that it was so as to the allotment, and if so as to one or the other, it was sufficient for his purpose.

The point depended upon the construction of the 41 Geo. 3, c. 109, s. 8, the general act; and the 54 Geo. 3, c. 153, s. 21, the local act. The 8th section of the 41 Geo. 3, directs the commissioners to set out and appoint public carriage roads and highways over the lands to be inclosed; and to divert, turn, and stop up, any of the roads or tracks over the said lands; with a proviso, that they shall stop up no old or accustomed road leading through any part of the old inclosure, in such parish, township, or place, without the concurrence of two magistrates. The 10th section provides "that it shall be lawful for the commissioners to setout such private roads, bridle ways, and footways, &c.,

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in, over, and upon, and through such allotment, as they shall think requisite." The 11th section provides, "that after such public and private roads and ways shall have been set out and made, all roads, ways, and paths over such lands," namely, newly inclosed lands, "which shall not be set out as aforesaid, shall for ever be stopped up and extinguished." I shall by and by refer more particularly to the language of that act, because the decision of the Court depends upon the construction to be put upon it.

By the 54 Geo. 3, the commissioners may stop up old roads in the parish, besides those over the lands to be inclosed, provided it shall not be done without the concurrence of two magistrates. It is, therefore, either under this latter clause of the 54 Geo. 3, or under the 8th section of the 41 Geo. 3, that the concurrence of two magistrates is required. The clause in the 54 Geo. 3, is either confined to such roads as pass wholly over other lands in the parish, exclusive of those to be inclused, and not passing in any part over the lands to be inclosed (and then it is inapplicable to this case); or else, it extends to such roads as pass, as well over the lands to be inclosed, as over other lands in the parish; and then it applies here. We think it extends to both. There would have been some old roads in the parish, wholly unconnected with the lands to be inclosed; and others leading over the lands to be inclosed, and also over other inclosures in the parish; and the latter roads might be called "roads not passing over the lands to be inclosed;" and though the language might not be very accurate, they might be called, in the very language of this act, "roads," besides the roads which pass over the lands to be inclosed.

There might be public foot ways, leading from one village to another, passing through an old inclosure in the parish of Egham to the lands to be inclosed, and leading from those lands to other inclosures in the parish of Egham; and if such public foot-ways are not within the operation of this clause, the commissioners will be able, without the concurrence of two magistrates, to stop up

the road against the public, if the 41 Geo. 3, gives them the power; if it does not, then they are not enabled to interfere with such roads at all: and it can hardly be supposed that either of those results was intended. the construction of the 54 Geo. 3, is doubtful, that construction ought to be adopted, which, while it gives the largest powers to the commissioners, most effectually protects the rights of the public: and, with that view, we are disposed to think that, under the 54 Geo. 3, the concarrence of two magistrates is necessary to warrant the stopping up of that part of the road which is beyond the limitation of the lands to be inclosed, namely, that part which led over the farm yard. This depends mainly on section 8. That section, in some parts of it, seems to have in view exclusively carriage roads; but in other parts, particularly that which relates to diverting and stopping up roads and tracks, it appears to apply to every description of road, whicher a private, or a foot road, only, or a carriage road. We think that the proviso at the conclusion of that clause is not confined to carriage ways, but extends to every species of road or way. I will refer to the language of that act, because that will exemplify my observation. The 8th section enacts, "That the commissioners under the General Inclosure Act shall, before they proceed to make any of the divisions and allotments directed in and by the said act, set out and appoint the public carriage roads and highways through and over the lands and grounds intended to be divided, allotted, and inclosed," that is, so far as they are applicable to carriage roads, " and divert, turn, and stop up any of the roads and tracks upon and over all or any part of the said lands and grounds, as they shall judge necessary." There, the expression is changed from "roads and highways," to "roads and tracks." Then there is a proviso, which we think must be considered as applicable to the words "carriage roads and highways," as contradistinguished from that which authonised the stopping up "roads and tracks," "So as such

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roads and highways shall be and remain 30 feet wide at the least." It seems to us impossible to say that the provision as to roads and highways remaining 30 feet wide at the least, is applicable to those "roads and tracks" which may be "diverted, turned or stopped up." We consider the clause should be read as if the words "and to divert, turn, and stop up," were written in a parenthesis; and that the commissioners have power to set out and appoint public carriage roads and highways, so as those roads and ways shall be and remain 30 feet wide, at the least, and so as they shall be set out in such directions as shall, upon the whole, be most convenient to the public. The words there, "so as they shall be set out," shew that the "roads and highways" which are to remain 30 feet wide, at the least, are roads which are to be "set out," and not roads or tracks which are to be "diverted, turned, or stopped up." Much of the question in this particular case depends upon the meaning to be attached to the words "roads and tracks," in this part of the clause which authorises the commissioners to divert, turn, or stop up. If the subsequent proviso with respect to the width was applicable to the carriage roads, and to the carriage roads only, it seems strange that the expression should be varied from "roads and highways," to "roads and tracks," as it is: especially as it will be found, on adverting to the other clauses of the act, that there is no provision with reference to roads and tracks, not being carriage roads and carriage tracks, unless the simple words "roads and tracks," are applicable to all sorts of roads. There is no provision with reference to bridle ways, or public footways; though they certainly would fall under the general provision in the 11th section, and must be stopped up, of necessity. The clause then provides, that there shall be a map, to be deposited with the clerk of the commissioners; and in some parts it speaks of carriage roads as being particularly those to which the attention of the legislature was directed: and then comes the proviso. Now if the words

"roads and tracks," are not to be confined to carriage roads and carriage tracks, then the word "track" can hardly be supposed to have been used in that limited Then the clause operates on something besides carriage roads; and if one part of it applies to something which is not a carriage road or way, the proviso may have the same application. The proviso is this:- "That in case the commissioners shall be empowered to stop up any eld or accustomed road" (not any old or accustomed carriage road), "passing or leading through any part of the old inclosures in the parish, township, or place, the same shall in no case be done without the order and concurrence of two justices of the peace, acting in and for the division, and not interested in the repair of the roads, and which order shall be subject to an appeal to the Quarter Sessions." Now, if the earlier part of that clause, or any part of it, which relates to stopping up, applies to bridle ways and footways, as well as to carriage roads, the proviso will have the same application; and then, when the commissioners are empowered to stop up an old carriage road, bridle way, or footway, passing or leading through any part of the old inclosure, they must have the order and concurrence of two magistrates for that purpose, and their order will be subject to an appeal. The 10th section of the act applies only to bridle ways, and private footways, and other things of a private nature; and the 11th section declares, "that all such roads, ways, and paths, which are not set out as aforesaid, shall be for ever stopped up and extinguished," and therefore, of course, applies only to such roads as are confined to, or lead only over the lands to be inclosed. One question, therefore, is, are the commissioners empowered, by the 54 Geo. 3, to stop up any old or accustomed road, passing through any part of the old inclosure in the parish? It is perfectly clear that they are empowered to stop up any of such as are unconnected with, and do not pass over any part of the land to be inclosed; and we are of opinion, that they are also empow-

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For these reasons, we are of opinion, that, upon these statutes, it was incumbent on the commissioners to obtain the concurrence of two magistrates, in order to stop up any part of such public road, and to deprive the public of the right which they before had, as well over the land to be allotted; as over the Farmyard, which was an old inclosure; and therefore that as there was not such concurrence, the road continues down to the present time, a public road. The consequence is, that the defendant is entitled to have the verdict entered for him, upon those pleas which justify under a public right of way.

Rule absolute.

## The King v. The Brighton Gas-Light and Coke COMPANY.

Fixing pipes in the ground for the conveyance of gas, to light a town, is a rateable occupation of land, within the meaning of 43 Eliz., c. 2, and the occupiers are rateable to the extent of the increased value of the land

ON appeal to the Quarter Sessions for the county of Susser, against a rate for the relief of the poor of the parish of Brighthelmstone in the said county, made upon the Brighton Gas-Light and Coke Company, of the sum of 61., for and in respect of the mains or pipes, and other apparatus for the conveyance of gas, belonging to the said company, situate, being, and fixed in the ground in the parish of Brighthelmstone, the sessions ordered the said rate to be confirmed, subject to the opinion of this Court, on the following case:so used, as long as it is applied to the purposes of a pipeway.

The Brighton Gas-Light and Coke Company was incorporated under statute 58 Geo. 3, c. 37, intituled "An Act for lighting with gas the town of Brighthelmstone, in the county of Sussex" (a), which is declared a public act. The buildings and manufactory are in the parish of Rottingdesn: the mains or pipes forming the subject of appeal are in the parish of Brighthelmstone, placed in the ground, and covered over. The gas is sold in Brighthelmstone. It is a manufactured article, and the profits of the manufactory arise from the sale of gas and coke, of which the gas is conveyed in mains or pipes, and the coke in carts.

(a) Section 42, of which act, after reciting, that for the purpose of using the gas for lighting the public streets, squares, &c., it would be requisite that the gas should be conveyed by means of pipes or tubes, to be properly laid for that purpose, proceeded to enact, that if at any time the commissioners (named in a prior act, passed for paving and lighting the town of Brighton) should think fit to contract with the Company to light the public streets, squares, &c., in the town of Brighton, it should be lawful for the Company, and their successors, under the direction and inspection of such commissioners, or of their surveyor, to break up the soil and pavements of any such streets, &c., and to dig and sink trenches, and lay pipes, and from time to time, under such direction and inspection, to alter the position of, and repair and relay such pipes, &c.

By s. 43, it was enacted, that it should not be lawful for the Company, or their servants, to break up the soil or pavement of any of the streets, &c., belonging to, or paved or repaired by or under the direction of the commissioners, without the consent in writing first had and obtained of the commissioners, to be signified under the hand of their clerk; nor to enter upon, or break up any pavement or soil of any public or private street, &c. being the property of, or belonging to, any body corporate, or any other person, without the consent in writing first had and obtained of such body corporate, or the respective owners for the time being.

And by s. 46, it was enacted, that the Company might, under the direction and inspection of the commissioners, or their surveyor, break up the soil or pavement of any of the streets, &c., and sink trenches, and lay any main or pipe, to communicate with the works of the Company, under, across, and along, any of the streets, &c., requisite for the supply of any dwelling-house, &c., so carrying into execution the powers thereby granted, and erect any machine, or other apparatus, requisite for securing to such dwelling-house, &c. a competent supply of gas, and also to alter the position of, repair, relay, or amend any pipes, although no contract might have been entered into with the commissioners for lighting any public street, &c., in the parish or place where such houses should lie or be situate.

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The mains and pipes within the parish of Brighthelmstone, produce no profit but by conveying gas: They are worth 300% per annum, at the least, to any person who could make use of them for that purpose; and it was proved by the testimony of a witness, that he would be willing to give 400%. per annum for them, taking all chances, both at law and in fact, as to the mode in which he might employ them, but that he formed his calculation upon a moral certainty of being able to employ them for conveying gas. The expense of putting them down, amounted to 10,000% and upwards, and the sum of 40% per annum, at which the mains or pipes are assessed, is a ninth part of the estimated value of 3601., that being the proportion in which other rateable property at Brighthelmstone is rated. Personal property is not rated in Brighthelmstone.

Marryat and Courthope, in support of the order of sessions. Two points will be raised on the other side; first, that the Company are not rateable occupiers of land in Brighton, within the meaning of the statute, 43 Eliz. c. 2; and, second, that assuming them to be rateable, they can be rated only in respect of the land actually occupied, without regard to the value of the pipes used in conveying the gas. Both these points, it is submitted, must be decided against the Company. As to the first, it is a settled principle, that wherever there is a use made of the soil, either for the purpose of constructing a building, or producing a convenience which is identified with the soil, the party is to be considered as an occupier of land within the meaning of the statute, and, therefore, rateable to the poor of the parish where the land is situated. And no distinction can be taken as to the mode in which the land is used, so long as the subject of the rate be incorporated with the soil, or the soil be made subservient to the purpose of the party by whom it is occupied. Cellars under ground, and buildings erected upon the surface of the land, are alike

rateable. So, in this case, the soil in the parish of Brighton, being made subservient to the purposes of the Company, the land through which their gas pipes pass, is rateable in their hands, within the meaning of the statute. It is admitted, that in Rex v. The Birmingham Ges-Light and Coke Company (a), the only question was, as to the extent to which the Company ought to be rated; and though the Court held, that the profits arising from the sale of gas, as a manufactured article, were not rateable, yet no doubt was intimated, that the Company were rateable as occupiers of land, in respect of the trunks, pipes, and other apparatus used by them for the conveyance of gas. In principle, this case is determined by Rex v. The Corporation of Bath (b), and Rex v. The Rochdale Water-works (c), which decided, that the pipes laid under ground in one parish, for the conveyance of water from a spring, or reservoir, in another, were rateable in the parish in which they were situated. The principle of those decisions was, that the soil was made use of by means of the pipes, for the benefit of the defendants respectively. There is then no difference between gas pipes and water pipes, if both are used for purposes of profit. Here the defendants have the exclusive use of the soil, by means of the pipes laid under it, and they are clearly rateable in the parish through which the pipes pass. Secondly, the Company are rateable, not merely with reference to the value of the land itself, but with reference also to the value of the pipes, for the purposes to which they are applied. Here the pipes are fixed to, and have become parcel of the freehold; and, therefore, the value of the pipes is to be taken into consideration. Possibly, the land through which the pipes pass, would by itself be of little or no value, but with the addition of the pipes, it becomes valuable, and according to the additional value so given to it, the The Kind . v. . The BRIGHTOW GAS-LIGHT AND COKE COMPANY.

defendants must be rated. Undoubtedly, the defendants

<sup>(</sup>a) Ante, vol. ii. 735. 1 B. & C. (b) 14 East, 609. 506. (c) 1 M. & S. 634.

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must be brought within the language of the statute of Elizabeth, as "occupiers of land," inasmuch as in that form only can they be rated; and it is admitted, that they are rateable only according to the rent which the land would produce, to be let by the year. Now the case finds, that the pipes are worth at least 360% per annum, to be let for the purpose of conveying gas; and, according to that value they must be rated. The question in these cases always is, what is the value of the land, with reference to the uses to which it is applied? Without the pipes, the land would be of no value, but with them it becomes valuable; and as the pipes are connected with the soil, they are part of the freehold, and so rateable as parcel of the land. It is upon this principle that the machinery of a mill is rateable, and enters into the rateable valuation, because it is annexed to the freehold. Even the addition of a personal chattel, will give an increased rateable valuation, as in the case of Rex v. Saint Nicholas Gloucester (a), where a weighing machine affixed to the freehold was held rateable. So, also, in the case of a personal chattel used with the freehold, though not identified with it. enters into the valuation of the premises, as in Rev v. Hogg (b), where a carding machine was held rateable. In short, whatever gives an additional value to the land, by the use to which it is applied, enters into the rateable valuation. Can it be doubted, that a drain, or a tunnel under the Thames, would be rateable, by reason of the increased value thus given to the soil? [Here the Court stopped him].

Adams, Serjt. Long, and Doughty, contrà. First, the Company are not rateable occupiers of land, within the meaning of the word "occupier," as used in the statute; and second, if they are occupiers, they can only be rated for the land they occupy, and not for the value of the gas pipes. As to the first point, it is clear, that in order to

<sup>(</sup>a) Cald. 262.

<sup>(</sup>b) Id. 266.

constitute a party an occupier, he must have the sole and undisturbed use and enjoyment of the soil, for all purposes to which he may think proper to apply it. Here the Company have no more than an easement, without any interest whatever in the soil. By sections 43 and 46 of the statute, by which the Company are established, they cannot disturb the soil, for the purpose of laying down their pipes, without the consent and control of the commissioners for paving and lighting Brighton; and the license, when granted, is then qualified, inasmuch as they cannot apply the pipes to any other purpose than that of conveying gas to the town. It cannot, therefore, be said, that they are "occupiers" of land. This case is mainly distinguishable from Rex v. The Corporation of Bath, because there the water company had full power and authority to break up the soil, and take possession both of public and private land. Here the Company have no power to do any thing with the land, but what the pavingcommissioners chuse to give them license to do. Secondly, at all events, the Company are only rateable as occupiers of land, and the pipes are not to be taken into calculation in the criterion of value. The pipes are not parcel of the freehold; they are mere personal chattels, removeable at pleasure, and are used merely for the purpose of conveying, from one place to another, an article of manufacture. The foundation of the rate must be, a valuation of the pipes, as land. Now, these pipes are made of iron, and there may be a great difference between the value of land and that of iron. The pipes cost 10,000l., and they may not be worth half that sum to any other person; so that they are not valued as land, but as iron, which involves something like an absurdity. If they are rateable at all, it must be as land; but forming no part of the land, the fair criterion of the Company's rateability can only be, the quantity of land which they actually occupy. It is very difficult to say, that these pipes, which are only covered up to protect them from external injury, are incorThe King
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porated with, and have become identified with, the soil. They are merely used for the purpose of carrying a manufactured article to market, along the public highway. There is a manifest distinction between gas and water; one being an artificial, the other a natural production. Suppose the gas to be conveyed in pipes, without touching the ground, would it then be said that they are rateable as land? and yet, in the mode in which these pipes are used, the Company have as little beneficial enjoyment of the soil, as if they were conducted through the air. fact, the Company enjoy no more than an easement, without any interest whatever in the soil. The cases of Rex v. St. Nicholas, Gloucester, and Rex v. Hogg, are inapplicable to this; because, there the machines became identified with, and gave an additional value to, the buildings in which they were used. But here the land acquires no additional value to the defendants, because it is merely used as a limited easement for the conveyance of the gas, which might be carried in another manner. There is a well known distinction between interests and easements (a); and as for a mere easement, it is submitted that the defendants would not be rateable. The pipes, per se, have no rateable value at all. The value they acquire, is in the use made of them, in conveying gas. So that, in effect, this is a mode of rating a manufactured article, which would otherwise not be rateable to the poor. Company are already rated in the parish of Rottingdean, where their manufactory is situated; and, it is submitted, that they are rateable wholly there, and are not liable to contribute in Brighton, for the use they make of these pipes.

BAYLEY, J.—In order to make property of this description rateable, it must come within the language of the statute, 43 *Eliz.* c. 2., "every occupier of lands;"

<sup>(</sup>a) See Hewlins v. Shippam, ante, vol. vii. 783. 5 B. & C. 221, and the cases there cited.

otherwise it is not liable to be rated: and, therefore, the only question in this case is, whether this Company are, or are not, to be deemed occupiers of land, and to the extent to which, in this instance, they have been rated? The Company are empowered, by an act of the 58 Geo. 3, to break up the soil; but they are not to do so without the leave and license of the commissioners for paving and lighting Brighton, and, in the case of private persons, without the leave and license of the owners of the land; and when they have broken it up, they are entitled to lay down pipes for the conveyance of gas, from their gasometers at Rottingdean to Brighton. The rate in this case is imposed upon the mains, pipes, and other apparatus, fixed in the ground, for the purpose of so conveying the gas to Brigh-If it were doubtful on the face of this case whether the mains, pipes, and apparatus, were to be considered as parcel of the freehold, still I take it to be clear that the Company would be liable to be rated as occupiers of land for a pipe way, leading from their gasometers to Brighton; but I think we may collect from the case as stated, that these pipes are fixed in the ground, and form part and parcel of the freehold; and if so, then the pipes are themselves liable to be rated, and consequently the Company have been properly rated to the extent in question. case of Rex v. The Corporation of Bath (a) decides, that where there is a right to lay pipes on certain land in a particular parish, those who so lay the pipes are to be treated as occupiers of the land; and that if the pipes are incorporated with the soil, they become parcel of the land, and for that reason rateable. So, in the case of Rex v. The Rochdale Water-works Company (b), the same principle was established. The case of Rex v. The Birmingham Gas-Light and Coke Company (c), proceeded entirely on the same ground. It was not there disputed, that the Company were to be considered as the occupiers of the land in which the gas pipes lay. There the only question was, as

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<sup>(</sup>a) 14 East, 609.

<sup>(</sup>b) 1 M. & S. 634.

<sup>(</sup>c) Ante, vol. ii. 735. 1 B.

<sup>&</sup>amp; C. 506.

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to the extent to which the Company were liable to be rated. In rating the Company, a distinction had been made between what was fixed to the freehold and formed parcel of the land, and that which was separated from it. They had been rated to an amount beyond that which was applicable to them in their character of occupiers of land; but to the extent in which they could be considered as occupiers of land, the Court held them to be clearly rateable; and it was there determined accordingly, that the Company were to be treated as occupiers of land to the extent to which their mains and pipes were identified with the soil, and those mains and pipes were to be deemed as part and parcel of the land. In the case of a canal, which is rated as a passage for water, it is not rated merely in the parish where the tolls are collected, but in each and every parish through which the canal passes, as an occupation of land covered by so much water. If, in a canal act, there is no provision to the contrary, with reference to the improved value of the land by converting it into a canal, the rate is to be made upon each parcel of the canal, in proportion to the profit derived from the whole line, according to the extent of canal in each particular parish. There are many canal acts which contain a provision, that the land covered by the water shall only be liable to be rated according to the value of the land before it was converted into a canal; but in the absence of such a provision, there is no doubt that the canal would be liable to be rated according to the extent of the improved value which the land thereby acquired. If, in this case, the Gas-Company had caused a provision to be introduced into their act, guarding against their liability for the mains and pipes. exclusively of the mere value of the land occupied, the argument for the defendants would have been most cogent; but in the absence of such a provision, the mains and pipes must be considered as part and parcel of the land, and so rateable in the same manner as buildings on the land, during the period of time they are suffered to remain.

A doubt areas in my mind at one period of the aggument, whether the right which the Company probably have of semoving the pipes whenever they should think fit, would prevent them from being rateable in respect of the increased stalue of the land; but upon consideration, I think that such a right will make no difference at all, as to the extent to which they ought to be rated during the period of time the pipes continue in the ground; for if a building is exected for the purposes of trade, and the party occupying should be at liberty to remove it at the expiration of his term, yet, so long as it remains in his occupation and imparts a value to the land, he is rateable according to its value, without entering into the question as to his right of removal. There are several cases establishing a principle of rateability which is perfectly applicable to the present For instance, a way-leave (a term well known in this country), is rateable. If a party has no more than a right of passage in common with the owner of the land, he is not rateable; but if he has a specific and distinct line of passage, and he thereby acquires an exclusive right of occupation, he is rateable in respect of the value of the way so secured to him. In such case, the way-leave is rated not according to the value of the land independently of the privilege given, but according to the value of it in the occupation of the party. Upon these grounds, I am of opinion, first, that this property is rateable in the hands of the Company as occupiers; and, secondly, that it is rateable to the extent to which it has been rated, during the time the pipes constitute part of the freehold; for, I think, they are to be considered as part of the land, so long as they remain in the ground. And, thirdly, I think these pipes are properly to be rated in Brighton, and not in Rottingdean; because as the rate is to be upon the land in Rottingdean, it must be upon what is locally situated in that parish; and so also the rate in Brighton must be upon that which is situated in that parish. On these grounds, the order of sessions must be confirmed.

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HOLROYD, J.—I am also of the same opinion. I think that this property is rateable in the hands of the Gas-Light Company, to the extent to which it has been rated. appears to me, that this case has in effect been determined by a number of other cases, which are exactly similar in principle, excepting that here the right of the Gas Company to have their pipes continuing in the soil, may depend upon the will of the commissioners for paving and lighting Brighton; but it appears to me, that that makes no difference, for, so long as the Company do use the land, and have the occupation of it as a pipe-way, they are rateable for the increased value, although their right of occupancy may depend upon the pleasure of the Commissioners.. It is clear that the Company are rateable, as occupiers of the land, because, during the time they make use of it, they have the exclusive occcupation of that part through which their pipes are conveyed. Being therefore occupiers, I think it is equally clear that they are liable to be rated to the extent of the beneficial use which they make of the soil, and that the means of such enjoyment is to be taken into consideration, and not merely the value of the land itself. Upon the principle laid down in the cases of Rex v. St. Nicholas Gloucester, and Rex v. Hogg, which were the cases of a weighing machine and a carding machine, this is to be considered as the enjoyment of one entire thing, namely of the land, through the medium of the gas-pipes; and consequently that the beneficial use and enjoyment of the land by such means, is to be taken into consideration in estimating the amount of the rate.

LITTLEDALE, J.—It appears to me that this rate is properly made. In order to make these pipes the subject of rate, the rate must be upon the land, and the only question is, whether this is land which is rateable to the extent stated in the case. I am of opinion that the whole is to be taken as land; for the mains and pipes being fixtures upon the land, they become parcel of the land:

and the value of the whole is to be taken together. There is no doubt that the mains and pipes are fixed in the land, because the case states the fact to be so; the rate being made, "in respect to the mains or pipes and other apparatus for the conveyance of gas belonging to the Company, situate, being, and fixed in the ground in the parish of Brighton." The only difficulty seems to be, whether the Company are properly to be considered as occupiers of By the powers given by the act of parliament, the Company are authorised, with the consent of the commissioners for paving Brighton, to break up the land and lay down their pipes there. Therefore, when they do dig up the soil, and fix their pipes, they are to be considered as having the exclusive occupation of so much of the land as is necessary for that purpose. In the case of Dyson and others v. Collick (a), where the plaintiffs, who were employed as contractors to complete a navigable canal, had erected a dam composed of piles and earth, with the consent of the owner of the soil, it was held, that they might maintain trespass against the defendants, for breaking and destroying the dam. It appears to me, therefore, that this Company are virtually in the occupation of the land: and as they have in effect the exclusive occupation of so much of it as is necessary for the purpose of carrying on their works, the case comes within the principle of Rer v. The Corporation of Bath, and Rex v. Rochdale Waterworks Company; the only difference between this case and those being, that here the pipes are used for the conveyance of gas, and there, for the conveyance of water; but, upon the principle of those cases, this Company are also to be considered as having a rateable occupation by means of their pipes.

Order confirmed.

(a) 5 B. & A. 600. Ante, vol. i. 225.

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# The King v. The Inhabitants of Llantilie Grossenney, Monmouthshire.

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Where a pauper contracted by parol for the purchase of a cottage and garden, at the price of 40l., and having paid 30l. on account, was let into possession without a conveyance; and after remaining in possession for twelve months re-sold the premises for the like sum of 40l., and having given up possession, paid the original vendor the 10l. owing upon the purchase:—Held, that the pauper did not gain a settlement by the purchase of an estate or interest under 9 G. 1, c. 7, s. 5. BY an order of two justices; William Edwards, Mary his wife, and their four children, were removed from St. Peter's, Hereford, to Llantilio Grossenney, in the county of Monmouth. On appeal, the sessions confirmed the order, subject to the opinion of this Court, on the following case:—

The pauper, William Edwards, was born in the parish of Llantilio Grossenney; and he also gained a settlement in that: parish, by hiring and service. The parish of Llawtidio Grossenney relied on shewing a subsequent settlement, in a third parish, namely, Skenfreth, in the county of Monmouth. In 1816, William Edwards, the pauper. made a parol agreement with one Ann Carter, for the purchase of a cottage and garden, for the sum of 40%. Under this contract he took possession, and paid Asse Carter 301. on account. No conveyance was executed. After the pauper had been in possession twelve months, living and sleeping in the cottage, with his wife and children, he sold the property for 401., to Sarah Watkins, to whom he gave up possession, and afterwards paid the remaining 10l. to Ann Carter. The pauper was never in possession of the premises after he had paid the whole of the purchase money. Sarak Watkins is now in the possession of the cottage and garden. The question for the opinion of the Court is, whether William Edwards gained a settlement in Skenfreth?

Nolan, in support of the order of sessions, contended, that, under the circumstances stated in the case, the pauper gained no settlement in Skenfreth, by the purchase of any estate or interest in that parish, by force of the statute 9 Geo. 1, c. 7; and he relied upon Rex v. Long

Bennington, 57 Geo. 3 (a), Rex v. Geddington (b), and Rex v. Woolfit (c), as decisive authorities; whereupon the Court stopped him, and called upon

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Maule and Watson, contrà. The cases of Rex v. Long Bennington and Rex v. Geddington, which influenced the decision of the Court below, are distinguishable from the case at bar; and it is submitted, that notwithstanding those authorities, the pauper gained a settlement in Skenfreth by force of the statute. The effect of the cases cited, is merely to say, that in order to gain a settlement under the statute 9 Geo. 1, c. 7, there must be either an estate or an interest purchased, and it is sufficient if the estate or interest is such, as can be perfected in equity. Now, trying this case by that test, here there was the purchase of an estate, or an interest, which a Court of Equity would have perfected, by decreeing an absolute conveyance. In the first place, the vendor had made an absolute sale of the estate, so far as a parol agreement, receipt of three-fourths of the purchase money, and immediate possession in the vendor, could give effect to the transaction. Upon payment of three-fourths of the purchase money and possession given, the vendor became trustee for the purchaser, and the cestui que trust had then a sufficient interest in the premises, to gain a settlement under the statute. The indulgence given to the pauper, to take his own time in paying the remainder of the purchase money, would not vacate the contract which had been absolutely entered into. Payment of the remainder of the purchase money was an indefinite condition, which, when performed, rendered the contract complete, by relation to the time when it was first entered into. But, in the intermediate time, the pauper had such a vested interest as would satisfy the statute.

<sup>(</sup>a) Not reported, but referred to by Bayley, J., in the course of the argument in Res v. Geddington.

Ante, vol. iii., 405. 2 B. & C. 132.

2 Mag. Cas. 410.

<sup>(</sup>b) Ante, vol. iii., 403.2 B. & C. 129. 2 Mag. Cas. 101.

<sup>(</sup>c) Ante, vol. iv., 456. 2 Mag. Cas. 272.

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It is clear, that the pauper, by the payment of the remaining 101. at any time, might have compelled the vendors in equity, to execute a conveyance, and as that condition was ultimately performed, the purchase became complete. This is not a case of doubtful equity, of which, certainly, a court of law cannot take cognizance; but it is the case of a plain equitable estate, which this Court will take notice of with a view to the pauper's settlement. cases relied upon on the other side, involved respectively, a question of doubtful equity; and the facts in each differed from the facts of this case. In Rex v. Long Bennington, the contract had been absolutely rescinded after the pauper had been in possession six months, and the vendor returned half the deposit money. Rex v. Geddington, the purchase money was to be paid by a given day, and in default of payment it was expressly stipulated that the contract was to become void; and the money, not having been paid, the condition became broken, and there was an end to the agreement. the contrary, in the present case, the contract was never rescinded; there was no stipulation as to the time of paying the remainder of the purchase money; the contract was complete as far as events could make it; and the sum paid in the first instance, brought the contract within the very terms of the statute, as a consideration amounting to the sum of thirty pounds bona fide paid. But, giving full effect to the language of the Judges in the cases cited, it is rather favourable than otherwise to the present argument, for if, in those cases, the remainder of the purchase money had been paid, as in this instance (though, after the pauper had given up possession), it may be collected, that if such had been the fact, the Court would have held both cases to be within the statute as purchases of equitable interests. Here, the pauper having subsequently completed the payment of the purchase money, and the contract never having been rescinded, his equitable interest became perfect by relation to the time when he was first admitted into possession; and as the vendor, by the subsequent payment of the 101., could have been compelled to execute a conveyance, it seems clearly a case within the statute. 1826.
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BAYLEY, J.—It is very desirable to avoid nice distinctions in settlement law; and with that view, I think we ought to adhere, in this instance, to the language of the statute, and to the construction put upon it in decided cases. By the 9 Geo. 1, c. 7, s. 5, it is enacted, "That no person shall be deemed, adjudged, or taken to acquire a settlement in any parish or place, for or by virtue of any purchase of any estate or interest in such parish, whereof the consideration for such purchase doth not amount to the sum of thirty pounds bona fide paid," &c. In order to satisfy the words, "purchase of any estate or interest," the party must become the purchaser of some estate or of some interest; and I take the meaning of the word "interest," to be some specific, definite interest, of which he is the purchaser. The cases of Rexv. Long Bennington. Rex v. Geddington, and Rex v. Woolfit, establish this proposition: that although an equitable estate or an equitable interest is sufficient to confer a settlement, yet, the purchase of such an estate or interest must be complete before that consequence follows; for, if the party has not a perfect equitable estate, but has only what may be deemed a certain equitable right, he is not capable of gaining a settlement by the money that he has paid. Therefore, though he has contracted to purchase an estate of more than the value of 30l., and upon paying part of the purchase money has been let into possession, still he will not be entitled to a settlement, so long as the remainder continues unpaid. I believe the principle fairly to be deduced from those cases, is, that the relation of trustee and cestui que trust must be created, in order to entitle the party, by means of an equitable interest, to gain a settlement by the purchase. In Rex v. Geddington, the party had paid as large a sum as 160l., and might, by the payment of 150l.

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more, have been entitled to a perfect equitable estate; but he was unable to pay the residue of the purchase money, and consequently he was held to have acquired no settlement, although he had resided on the estate for a year and a half. In the present case, the pauper had bargained to pay 401. for the estate, and had he paid the whole of that money, he would have been entitled to a conveyance, because he would then have had a perfect equitable interest in the whole estate; but, having paid 301. only, he had not performed all he was bound to do, in order to become entitled to a perfect equitable estate, or interest. During the whole period of time that the pauper was resident on the estate, he could have been removed. Why? Because there was no time, during that interval, at which it could have been said, that he had purchased an estate or interest, By the payment of the remaining 101. whilst he was in possession, he might have had the estate conveyed to him. or have had an equitable interest in the whole estate: but I deny (for the purpose of settlement law), that the subsequent payment of the 101., after he had re-sold the estate and quitted possession, would (as has been ingeniously argued) give him a complete equitable estate ab initio, making him the owner of an estate in equity from the beginning. I apprehend, that the opinion expressed by my brother Holroyd, in Rex v. Geddington, that if the vendor, in that case, had paid or offered to pay the remainder of the purchase money, he might have acquired an estate in equity so as to confer a settlement upon him, means no more than that, if the party had remained in possession after he had so paid, or offered to pay the residue of the purchase money, he might have acquired a settlement; but not that he could have become settled by means of the previous possession. I am of opinion that this case must be determined upon the principle established in Rex v. Long Bennington, Rex v. Geddington, and Rex v. Woolfit; and that as this pauper had not become a complete purchaser of the estate by the payment of the purchase money, he does

not come within the words of this statute, as having purchased "an estate or interest," in the parish of Skenfreth.

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HOLROYD, J.—I am of opinion that this case comes within the principle of the decision in Rex v. Long Benmington, and Rex v. Geddington, and is not distinguishable from them. It appears, that after the payment of the 10L which was the remainder of the purchase money, the pauper was not in possession of the tenement. He therefere never came to settle on his own estate. It is true. that he had paid 30% when he was first let into possession; but he did not pay the residue, until after he had parted with the estate. If he had offered to pay the residue of the purchase money before he gave up possession, and it had been wrongfully refused by the vendor, that perhaps would have been equivalent to an actual payment, inasmuch as in equity, an offer to perform is equivalent to actual performance; but taking this to be so, still it must appear that the pauper, in order to gain a settlement, had a right to hold possession of the premises, assuming that he did continue to hold subsequently to the offer to pay the remainder of the purchase money. In this case there was no such offer, nor was there any possession by him after the payment of the 101.; and therefore, I think that the pauper gained no settlement in the parish in question.

LITTLEDALE, J., was of the same opinion.

Order of Sessions confirmed.

The King v. The Inhabitants of North Petherton.

BY an order of two justices, a pauper described as " Joseph Rich otherwise Coles, the son of Elizabeth Derham, formerly Rich, widow," was removed from North sufficient evi-

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Petherton, to West Monckton, both in the county of Somerset. On appeal, the sessions quashed the order, subject to the opinion of this Court, on the following case:—

The pauper, who was proved to be the legitimate son of John and Elizabeth Rich, was born in the parish of West Monckton. In order to make out the settlement of the pauper's father, it was proved by the production of a copy of the parish register of Sparton, that he was baptized in that parish. There was no other evidence of his having been born in that parish, and the court of Quarter Sessions thought, on the authority of Creech St. Michael v. Pitminster (a), that they were bound to consider the register by itself prima facie proof of the place of his birth.

T. Cabbell, and C. F. Williams, in support of the order of sessions. It is submitted, that the register of the baptism of the pauper's father, is sufficient evidence, until the contrary is shewn, that the father was born in Spaxton, where he was baptized. For this, Creech St. Michael v. Pitminster, seems an authority in point. [Bayley, J. We do not know at what age the pauper's father was baptized]. The presumption is, that he was baptized within a very short time after his birth. According to the doctrine of the church touching baptism, "the pastors and curates are directed to admonish the people, that they defer not the baptism of infants any longer than the Sunday next after the child be born, unless upon great and reasonable cause declared by the curate and by him approved;" Gibson's Codex, Jur. Ecc. Bap. tit. 18, c. 9. The question is, whether the best evidence was given at the sessions, of which the case was susceptible. Presumptive evidence is all that could be given after so long a lapse of time, when all persons who could have had any recollection of the pauper's father when an infant, must have been dead.

<sup>(</sup>a) Burr S. C. 765. 2 Bott, 13.

'Messathe second beat evidence of a birth settlement is the parish register of baptism, and in the absence of all suggestion of fraud, it is sufficient until rebutted by evidence to the contrary. The register is at least evidence to shew that the pauper's father was baptized in Sparton, and as there is no proof that he was born or known in any other parish, the reasonable presumption is, that he was born where he was baptized; and if so, then according to the doctrine of Helt, C. J., in Banbury v. Broughton (a), that "where the child is first known to be, that parish must provide for it, till they find another," a birth settlement was made out for the pauper's father in the parish of Sparton, and the order of sessions must be confirmed.

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Erskine, and G. Bernard, contrà, were stopped by the Court.

BAYLEY, L.—I think this case must be sent back to the sessions to be re-heard. I do not say that the register of baptism, when connected with other circumstances, is not evidence from which the justices may be warranted in drawing a conclusion as to where the child was born; but nakedly and per se, I do not think it is sufficient evidence of the place of the child's birth. If it could be ascertained what was the child's age at the time of the baptism, that would be a material circumstance to enable the Court to judge of the effect to be given to the register. If the child was very young at the time it was baptized, the register would be presumptive evidence that it was born in the parish where it was baptized; but if the child was proved to have been eight or ten years old at that time, the register would have established very little, and the sessions would hardly be justified in coming to the conclusion, that the child was born in the parish where it was baptized. Here we are left in doubt as to what age THE KING
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the child was at the time of its baptism, and therefore the register alone affords no ground for presuming that the pauper's father was actually born in Spaxton. The Sessions seem to have been influenced in their decision by the case of Rex v. Creech St. Michael; but I think that case is very distinguishable from the present. There, there was not only evidence of the register of the pauper's baptism, in Pitminster, but it was also proved by vivâ voce testimony, that the father, named in the register, who lived in Pitminster, and had died long ago, was considered as the pauper's father; and that the mother, named in the register, who lived in the same parish, was understood to be the pauper's mother, and that he had been heard to call her "mother." There was very little doubt in that case as to the effect to be given to the register of baptism. because, there was other evidence corresponding with the period at which the baptism was stated to have taken In this case, vivâ voce evidence of the like import place. would have been most material, and would probably have removed all difficulty upon the subject. All that the case cited decides, is, that the register of baptism with the addition of other circumstances may, and does afford a sufficient ground from which a conclusion may be drawn as to where the child was born; but it does not say that the register alone is conclusive upon the point. I am of opinion, therefore, that the register by itself did not afford a sufficient ground for the justices to draw the conclusion that the pauper's father was born in Spaxton.

HOLBOYD, J.—I am of the same opinion. I think the register alone is not sufficient to establish the place of birth. It would be sufficient, coupled with proof that the pauper's parents were living within the same parish at the time of the baptism, or that the birth had been shortly previous to the baptism, which latter circumstance would

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afford a strong presumption that the child was born in the same parish where it was baptized:

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LITTLEDALE, J., concurred.

Case sent back to Sessions to be re-heard.

# THE KING D. LEAMINGTON PRIORS.

BY an order of two justices, Sarah Penn, single woman, was removed from Middleton Cheney, in the county of a year, with a Northampton, to Leamington Priors, in the county of the part of Warwick. On appeal, the sessions confirmed the order, the servan consented subject to the opinion of this Court on the following to by the Caste:---

Sarah Penn, the pauper, was hired to Mr. Edward shall have Cooper, in Leamington Priors, at Whitsuntide, 1823, year, two or until Michaelmas in the same year. She entered into three days to service immediately after being so hired, and continued friends," is an therein until said Michaelmas, when she was again hired exceptive hiring, and by said Edward Cooper until the Christmas day follow- service under ing. On the day after Christmas day, the mistress offered settlement. the pauper to hire her for a year, to which the pauper agreed, the pauper at the same time requiring, and her mistress agreeing, that she should have, during the year, two or three days to see her friends, and she accordingly had three days, in February, 1824, having first asked her mistress if she might have them, to which the mistress replied. "Yes, you had better have them now, as the season will soon begin when you cannot have them." Under this latter hiring she staid till Michaelmas, 1824. when she was discharged, in consequence of being pregnant.

Hiring for stipulation on the servant, master, that the former "during the see her it gains no

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Humfrey (with whom was Holbech), in support of the order of sessions, contended, that this was a hiring for a year, and that the permission for the pauper to have two or three holidays was revocable by the mistress, and consequently negatived the presumption of an exceptive hiring.

Goulburn, and Amos, contra, were stopped by the Court.

BAYLEY, J.—Looking at the facts of this case, there is no doubt that this was not a hiring for a year. There had been two hirings for broken periods, and at the expiration of those broken periods, the mistress proposes a hiring for a year. The pauper agrees, but with a proviso; and the proviso is, that she shall be at liberty for two or three days to see her friends. Now there are many cases which say, that if, at the time of hiring, there is a stipulation giving the pauper the option of being absent during any part of the year, that time is to be considered as excepted out of the contract, and treated as a hiring for a year, minus the time the servant is entitled to be absent (a).

HOLROYD, J., and LITTLEDALE, J., concurred.

Orders quashed.

<sup>(</sup>a) See Rex v. Empingham, Burr. S. C. 791. Rex v. Bishop's Hat-field, id. 439. Rex v. Rushuline, 10 East, 325.

The King v. The Inhabitants of Saint Peter the Great, Worcester.

ON the 4th June, 1825, the churchwardens and overseers of the poor of the parish of Saint Peter the Great, mingham and Worcester in the city of Worcester, made a rate for the relief of the Canal Act, 31 poor, in which the Company of Proprietors of the Worrected that the Company should be follows:—

Against this rate, the Company appealed to the general quarter sessions of the peace for the city and county of worcester, when the sessions amended the rate, by reducing the sum of 81.8s.5d., at which the Company was rated, to the sum of 13s. 10d., and confirmed the rate so amended, subject to the opinion of this Court, on the following case:—

as the same lands would be rateable, in case the same were the property of individuals in their natural capacity."

By another act, 38 Geo.

By an act of 31 Geo. 3, it is enacted, "That the said Company of Proprietors, shall, from time to time, be rated to all parliamentary and parochial taxes and assessments, for and in respect of the lands and grounds to be purchased or taken, and all warehouses or other buildings to be erected by the said Company of Proprietors, in pursuance of this act, in the same proportion as other lands, grounds, and buildings, lying near the same, are or shall the company were liable to be rated, and as the same lands, grounds, and buildings, so to be purchased or taken, and erected, would be rateable in case the same were the property of individuals in their natural capacity." And by an act of 38 Geo. 3, for amending and enlarging the powers of 31 Geo. 3, and not according to the improved walled erived from the land some respects, been found defective, and the exercise of

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The Birmingham and Worcester Geo. 3, directed that the Company should be rated in respect of their lands in the tion as other lands lying should be rated, "and as the same lands would case the same were the providuals in their natural By another act, 38 Geo. 3, the like provision was made as to the Company's rateability, only omitting the latter words, "and as the same lands," &c. Held: That the company were liable to be rated for their lands, &cc., only at as other adjacording to the being used for the purposes of a canal.

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some of the powers and provisions thereof, as therein directed, inconvenient;" it is enacted, "That the said Company of Proprietors of the said Worcester and Birmingham canal, shall, from time to time, be rated to all parliamentary and parochial taxes, rates, and assessments, for and in respect of the lands and hereditaments, taken and used by the said Company, for the purpose of the said navigation, and all warehouses and other buildings, erected or to be erected thereon, by the said Company of Proprietors, by virtue of the said act, and of this present act, in the same proportions as other lands, grounds, and buildings, adjoining or lying near the said canal, are or shall be rated; but it shall be lawful for the said Company to agree with any owner or owners of any lands or hereditaments, to be purchased or taken for the purposes of the said navigation, for an exemption from all rates and taxes in respect of such last mentioned lands and hereditaments. and for charging the same upon the adjoining lands and bereditaments of such person or persons; and in all such cases, all the parochial and other taxes, rates, charges, and assessments, which might be thereafter charged upon, or payable, in respect of the lands or hereditaments to be ao purchased, or taken, for the purposes of the said navigation. shall be rated and charged upon such adjoining lands, and upon the owners and occupiers thereof; and the lands and hereditaments to be purchased for the purpose of the said navigation, shall be exempted and discharged therefrom." And it is in the same act further enacted, "That all perochial rates and assessments which shall or may at any time be laid, assessed, or imposed, upon the rates and personal estate of the said Company of Proprietors, shall be laid, assessed, or imposed, in each parish, township, hardet, or place, respectively, in proportion to the length of the said canal in each respective parish, township, hamlet, or place. and not otherwise." And also in the same act it is enacted, "That the said act of 31 Geo. 3, and all and every the clauses, articles, provisions, matters, and things, therein

contained, [except such and so many of them or such parts thereof, as are altered, varied, explained, or amended, by this act] shall extend, and be applicable to this present act, and the powers, provisions, and directions hereof, in so far as the same are compatible herewith."

The question for the opinion of the Court is, whether the land used for the canal is to be assessed at the same rate as the adjacent lands, or whether the profits derived from the tolls are to be included in the rateable value? If the Court are of opinion, that the land so used is to be assessed at the same rate as the adjacent lands, then the rate is to stand as amended by the quarter sessions; but if the Court are of opinion, that the profits derived from the tolls are to be included in the rateable value, then the rate is to be amended by inserting the sum of 8l. 8s. 5d. instead of 13s. 10d.

W. O. Russell, (with whom was Ryan) in support of the order of sessions. This case has, in effect, been decided by, and is not distinguishable from, Rex v. The Grand Junction Canal Company(a). In that case, a statute of 34 Geo. 3, c. 24, s. 19, directed that the Company should be rated for all lands and buildings in the same proportion as other lands and buildings lying near the same, and as the same would be rateable if they were the property of individuals in their natural capacity; and the statute 36 Geo. 3, c. 25, s. 7, directed that all rates and assessments upon the personal estate of the Company, should be assessed in every parish in proportion to the length of the canal in such parish; and the Court there held, that the Company were hable to be rated for their lands, only at the same value so other adjacent lands, and not according to the improved value derived from the land being used for the purposes of the canal. Unless that case has been erroneously decided, it is a conclusive authority for holding in this instance,

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Leicester (a), in which the rateability of the Dudley Canal Company came in question. There is no doubt, that unless there is some clause of exemption in the act of parliament, land taken for the purposes of a canal will be rateable, not merely as land, but according to its improved value, acquired in consequence of the purpose to which it is applied. But inasmuch as canals are supposed to be of public benefit, there are in many canal acts, clauses introduced for the purpose of giving exemption from rateability, so far as that the lands taken for the purpose of a canal are to be left on the same footing on which they were at the time when taken. In this case, the first act of parliament is the 31 Geo. 3, and it is conceded, that the language there used, is not fairly distinguishable from the language of the statute, in the case of Rex v. the Grand Junction Canal Company. But it is insisted, that in consequence of a variation in this case between the language of the 31 Geo. 3, and the 38 Geo 3, the former is virtually repealed, and therefore, that the proprietors of this canal are liable to be rated according to the productive value of the canal. The 31 Geo. 3, provides, "that the Company shall be rated to all parliamentary and parochial taxes and assessments for and in respect of the lands and grounds to be purchased er taken by them, in the same proportion as other lands and grounds, lying near the same are or shall be rated: and as the same lands and grounds would be rateable in case the same were the property of individuals in their natural capacity." The effect of that clause is clearly to exempt the lands taken by the Company from any farther increase of rate, in consequence of any increase in the future value of the lands, by being applied to the purposes of a If when the legislature passed the 38 Geo. 3, they had intended to repeal the clause alluded to in the 31 Geo. 3, it would have been easy so to have done, by introducing a clause saying, that for the future, the lands

<sup>(</sup>a) Not reported. See Rex v. The Dudley Canal Navigation Company. Ante. vol. vii. 466.

taken for the purposes of the canal, should be rated according to their improved value. Instead, however, of doing that which is argued to be a virtual repeal, it enacts "that the Company shall be rated to all parliamentary and parochial taxes, rates and assessments, for and in respect of the lands taken by the Company, in the same proportions as other lands, grounds, and buildings adjoining or lying mean the said canal, are, or shall be rated." Does this repeal the former clause, which places the lands on the same footing with other lands adjacent? Certainly not; and if such had been intended to be the effect of it, doubtless we should have found words declaring, "that the lands to be taken under this act shall be liable to be rated in the way all other lands are rateable," namely, according to their improved value. Suppose the words in the 31 Geo. 3, "and as the same lands would be rateable in case the same were the preperty of individuals in their natural capacity," (upon which so much reliance is placed) had been omitted, what would be the construction to be put upon the clause in which they are found? I think exactly the same as if they had never been inserted; for I consider those words merely explanatory of the preceding enactment. Could any thing be so absurd as to introduce into an act of parliament, a provision for a purpose which the common law itself would effect; for to that extent must the argument go, if it has any validity, with a view of showing that in this instance, the subsequent has the effect of repealing the prior, act of parliament. But the latter part of the same clause in this act, (which has not been so particularly brought under our notice), seems to me to put this matter beyond all possibility of doubt, by shewing what must have been the intention of the legislature in passing the 38 Geo. 3. That clause gives power to the Canal Company to make specific bargains for the purchase of lands exempt from rates, and to shift the rates from lands taken by the Company, and to place them upon certain other lands in the hands of individual pro-

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prietors. What is the consequence of such provision? Why, that the lands which the Company so take, are to be exempted in toto, whilst those in the hands of inindividuals, are to be burthened as before. Can it then be doubted, that the value of the land at the time of such sale, must remain the rateable value? The words of the clause are :- " It shall be lawful for the Company to agree with any owner or owners of any lands or hereditaments of sufficient yearly value, adjoining or lying near to the lands or hereditaments to be purchased or taken for the purpose of the said navigation, for an exemption from all rates and taxes in respect of such last mentioned lands and hereditaments, and for charging the same upon the adjoining lands and hereditaments of such person or persons, and in all such cases, all the parochial and other taxes, rates, charges, and assessments, which might be thereafter charged upon or payable in respect of the lands or hereditaments to be so purchased or taken for the purposes of the said navigation, shall be rated and charged upon such adjoining lands, and upon the owners and occupiers thereof; and the lands and hereditaments to be purchased for the purpose of the said navigation, shall be exempted and discharged therefrom." clause, it seems to me, explains the principle on which the Court is to decide this case, and shews that the meaning of the 38 Geo. 3, was not to repeal the 31 Geo. 3, but to re-enact what the 31 Geo. 3, had previously enacted, merely omitting the unnecessary explanation which the 31 Geo. 3, had contained, but to make an additional provision in support of the original exemption, which the 31 Geo. 3, had enacted. For these reasons, I am of opinion, that the sessions have put the right construction upon these acts of parliament, and that the Company are liable to be rated only according to the value of the land, in its character of land, and that the profits derived from the tolls, are not to be included in the rateable value.

Holroyd, J. I am of the same opinion. I think that the first part of the clause in the 31 Geo. 3, is to receive the same construction, as if the latter part had been altogether omitted. If that be so, then the omission INHABITANTS of those words in the 38 Geo. 3, can have no effect upon the clause in the first act, and the same construction must be given to both. But I think the additional clause pointed out by my brother Bayley, in 38 Geo. 3, is quite decisive to shew that the legislature meant to exempt the lands used by the Company from any additional rateability in consequence of the profit derived from the tolls.

LITTLEDALE, J., concurred.

## Order of Sessions confirmed (a).

(a) The like decision took place in another case reserved by the sessions upon a rate made upon the Company, "for lands for wharfs, basin, warehouses, engine-house, lock-house, gardens, and premises, and for tolls and profits arising therefrom," for the relief of the poor of the same parish, in the County of Worcester. In this assessment the Company had been rated at the sum of 111. 4s. 5d., which the sessions reduced to the sum of 14s. 04d.

#### COLLINS v. LIGHTFOOT.

THIS was a rule calling upon the plaintiff to shew cause why the bail bond given in this case should not be given up to be cancelled, upon the defendant's filing common bail. The affidavit stated, that in the year 1820, the defendant was discharged under the act for the relief of insolvent debtors; that his schedule contained an entry of Act, cannot be the sum of 11671., being the consideration money mentioned in a certain indenture, dated 5th October, 1810, by which one E. M., granted an annuity to the plain- crued since tiff, and the principal sum mentioned in a certain bond, by which defendant became bound with the said E. M., for the payment of such annuity; that notice of defendant's discharge was duly served upon plain-

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> Friday 26th May.

A joint obligor of a bond for the payment of an annuity, who has been discharged under the Insolvent arrested on the bond for arrears of the annuity achis discharge.

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tiff; that defendant was duly discharged; and that afterwards defendant was arrested by plaintiff for the amount of four years' arrears of the annuity, which had become due since defendant's discharge.

Hutchinson shewed cause. The defendant was merely a surety; he was no party to the annuity deed; he only joined in the bond as a surety. He was, therefore, not released from his liability by his discharge under the insolvent act, 1 Geo. 4, c. 119, because s. 10 of that act applies to principals only, and not to sureties. That seetion provides, "that all and every creditor or creditors of any such prisoner, for any sum and sums of money payable by way of annuity or otherwise, at any future time or times, by virtue of any bond, covenant, or other securities of any nature whatsoever, may be, and shall be entitled to receive a dividend or dividends of the estate of such prisoner, in such manner, and upon such terms and conditions, as such creditor would have been entitled unto. by the laws now in force, if such prisoner had become bankrupt: the amount upon which such dividend shall be calculated, and the terms-and-conditions on which the same shall be received, being first settled by the said court; and without prejudice in future to their respective securities, otherwise than as the same would have been affected by a proof made in respect thereof by a creditor under a commission of bankrupt, and a certificate obtained by the bankrupt under such commission." Now that clearly applies to principals only. The defendant being only a sarety, the bond could not be enforced against him until the principal had made default; and therefore, section 28 of the act, does not apply either: for that only enacts, "that after the said Court shall have declared any prisoner to be entitled to the benefit of this act, as aforesaid, no writ of fieri facias shall issue on any judgment before then obtained against such prisoner, for any debt contracted, or cause of action arising, before the time of

the commencement of such actual custody as aforesaid." Neither does the subsequent act of 3 Geo. 4, c. 123, s. 13, vary the case, for that only enacts, "that any prisoner who shall have been or shall be declared entitled to the benefit of the said recited act," the 1 Geo. 4, c. 119, "and who shall have obtained or shall obtain a discharge under the said act, shall be discharged against every creditor for any sum of money, payable at any future time or times, who shall, under the said recited act, have become entitled to a dividend of the estate of such prisoner, in respect to any debt or claim so growing due and payable, and which shall not be due or payable at or before the time of such prisoner obtaining his discharge, in like manner, to all intents and purposes as if such debt or claim were payable presently, and not at a future day." The case of M'Dougal v. Paton(a), is inapplicable to the present, for there it was only held, that a person could not be considered as surety, or liable for the debt of a bankrupt, within the meaning of the words of the 49 Geo. 3, c. 121, s. 8, unless such debt existed, as a debt, at the time of the issuing of the commission: and in Baxter v. Nichols (b), though the party arrested was held to be discharged by the bankruptcy and certificate, it was upon the ground that he must be considered as a principal.

# D. Pollock, contrà, was stopped by the Court.

ABBOTT, C. J.—As the bond in question is not produced before us, we must of course assume that it is in the common form, and that it contained nothing particular to shew which of the parties was the principal, and which the surety. If so, the plaintiff was a creditor of the defendant's, within the language and meaning of the l Geo. 4, c. 119, s. 10, at the time of his discharge, and the money for which he is now suing, was money payable by way of annuity at a future time by virtue of the bond, and consequently, it seems to me that the

(a) 2 J. B. Moore, 644.

(b) 4 Taunt. 90.

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defendant is protected from arrest under the statute. This rule, therefore, must be made absolute.

The other Judges concurred.

Rule absolute.

Friday, 26th May.

A declaration in ejectment was left at the house of the tenant in possession, on Saturday, and received by him on the next day, Sunday, before the essoin day :—Held, that this was service of process on a Sunday, within the 29 Car. 2, c. 7, s. 6, and void.

DOE on the demise of WARREN v. ROE.

R. V. RICHARDS moved for judgment against the casual ejector. His affidavit stated that a copy of the declaration had been left at the house of the tenant in possession, on Saturday 20th May, and that the tenant had subsequently to the essoin day of this term, acknowledged that he received the copy of the declaration on Sunday, 21st May, the day before the essoin day.

HOLROYD, J., the only Judge in Court. This is not a good service. The 29 Car. 2, c. 7, s. 6, enacts, that service of any process on a Sunday shall be void; and I think a declaration is process within the meaning of that The Master informs me that he has a MS, note of a case in which I, myself, made a similar application to the Court, and was refused. It has been held that service of notice of plea filed on a Sunday is void by construction of the statute; Roberts v. Monkhouse (a); and à fortiori I should say that service of a copy of a declaration on that day is bad also. Then if such service on the tenant by the lessor of the plaintiff would be bad, the mere circumstance of the declaration reaching the hands of the tenant by means of a third person on the Sunday, having been left on the premises the day before, cannot alter the case, for the real time of the service is the time when the tenant receives the declaration.

Rule refused.

(a) 8 East, 547.

### ELMORE v. KINGSCOTE.

ASSUMPSIT for goods sold and delivered, with a count on the quantum valebant. Plea, non-assumpsit, and issue At the trial before Abbott, C. J., at the ad- the purchase journed Middlesex Sittings after last term, the case was this:—The action was brought to recover the sum of two state the price hundred guineas, the price of a horse, alleged to have been or it will not purchased by the defendant of the plaintiff. It appeared satisfy the rethat on the 13th of June, the parties entered into a 29 Car. 2, c. verbal agreement for the purchase and sale of the horse. warranted five years old, for two hundred guineas; and the following letter from the defendant to the plaintiff was produced :- "June 18th. Mr. Kingscote begs to inform Mr. Elmore, that if the horse can be proved to be five years old on the 13th of this month, in a perfectly satisfactory manner, of course he shall be most happy to take him; and if not most clearly proved, Mr. K. will most decidedly have nothing to do with him." The question was, whether this letter constituted a sufficient note or memorandum in writing of the bargain, to take the case out of the operation of the Statute of Frauds; and the Lord Chief Justice being of opinion that it did not. directed a nonsuit, but gave the plaintiff liberty to move to enter a verdict for him.

Scarlett now moved accordingly. The defendant's letter was clearly an acknowledgment that he had purchased the horse on the 13th of June; and, therefore, it was a note or memorandum in writing of a bargain for the purchase and sale of a horse. It did not, indeed, make any mention of the price, but that was immaterial; for the plaintiff was at liberty to prove the value of the horse by parol evidence, and having done so, might have recovered the amount upon the count for the quantum valebant.

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1826. Saturday, 27th May.

A note in writing of a bargain for and sale of goods, must of the goods, quisites of the 3, s. 17.

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ABBOTT, C. J.—There must be a note in writing of the bargain: that is, of the whole bargain; and the price is a very material part of the bargain. This letter makes no mention of the price, and, therefore, it is not a note of the bargain. If we were to allow the plaintiff in such cases to prove the price agreed upon by parol evidence, we should be letting in much of that very mischief which it was the object of the statute to shut out. I am, therefore, still of opinion, that the nonsuit in this case was right.

The other Judges concurred.

Rule refused.

1826. Saturday, 27th May.

Evidence in support of an information before a magistrate under the Game Laws. cannot be received in the absence of the defendant, at least, where

he has not

ally summoned to ap-

pear to the

been person-

information. Quære, whether, in such case, an attorney is by be present, and to act for the defendant. before the magistrate.

The King v. The Rev. John Commins.

THIS was a rule calling upon the defendant, a justice of the peace, to shew cause why a criminal information should not be filed against him, for illegally and corruptly convicting one William Crudge, in a penalty of 201., upon an information laid against him under the Game Laws.

The affidavits upon which the rule was obtained, stated. that the prosecutor had not been duly summoned to appear before the defendant, to answer the information laid against him, inasmuch as no summons for that purpose had been personally served upon him; that the defendant. nevertheless, proceeded to examine witnesses in support of the information, in the absence of the prosecutor; that an attorney, employed by the presecutor, attended on his belaw entitled to half at the hearing of the information, but was prevented by the defendant from cross-examining the witnesses called in support of the information; and that the defendant, after hearing the witnesses, convicted the prosecutor in a penalty of 20%, at the same time declaring, that if an attorney had not attended on his behalf, he should

have fined him only 101., instead of 201. The affidavits in answer to the rule, admitted that the summons to appear before the defendant was not personally served upon the prosecutor, but stated facts from which it was clear that the prosecutor knew that such a summons had issued. They also admitted, that the witnesses had been examined in the absence of the prosecutor, and that his attorney had been prevented cross-examining them; but they stated, that the former was a common and ordinary course on such occasions, and that the cross-examination so prevented, was upon an immaterial and irrelevant matter. They also admitted the declaration with respect to the amount of the fine, but denied that the defendant had any malicious or corrupt motive against the prosecutor in the transaction.

Copley, A. G., and Coleridge, were heard in shewing cause against, and Scarlett, and Chitty, in support of the rule.

ABBOTT, C. J.-Looking at the affidavits on both sides, they do not appear to me to furnish such evidence of malicious or corrupt motives on the part of the defendant, or of actual injustice worked to the prosecutor, as to call upon us to make this rule absolute; but there does appear to have been so much impropriety in the defendant's conduct, that the prosecutor might fairly be induced to think that he had good grounds for making this application: and therefore, though the rule must be discharged. I think it must be upon payment of the costs by the defendant. It is admitted that the summons was not personally served, which is clearly irregular; for we have recently decided, that the record of a conviction by default, upon the 5 Ann. c. 14, must shew that the defendant has been personally summoned to appear to the information (a). It seems clear, however, that the prosecutor knew of the summons having been taken out against

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<sup>(</sup>a) Rex v. Hall, ante, vol. vi., 2d edit. by Dowling, 133, et seq. 84. See Paley on Convictions,

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him; and therefore, though he was not personally served with it, he has not sustained any injury, for he might have appeared if he had thought proper. Whether the defendant was or was not bound, in point of law, to permit the prosecutor's attorney to be present, and to act-for him, I will not upon the present occasion pretend to decide; it is a very important question, and whenever it is regularly brought before me, I shall give it that grave consideration which it deserves (a); but having permitted him to be present, and to act, the defendant was wrong in interrupting him, even though the interruption might be immaterial. In making the declaration which it is admitted he made, respecting the amount of the fine, the defendant acted, to say the least, very indiscreetly and unadvisedly, and I much disapprove of his conduct in that respect. Upon the whole, though I consider the defendant's conduct to have been extremely improper, still, as I do not see sufficient proof of malice or corruption, I think the justice of the case will be satisfied by discharging the rule, upon payment of the costs by the defendant.

BAYLEY, J.—I am of the same opinion. I will merely add, that there seems to be a general, but erroneous practice among justices of the peace, of taking evidence in cases like the present, in the absence of the party accused; as was done in the present case. It is a highly irregular and improper course, and it must be corrected.

ABBOTT, C. J.—I had intended to make the same remark. It is quite necessary that such an irregularity should be altered. It is a most improper practice, and I trust it will be abandoned for the future.

The other Judges concurred.

Rule discharged, upon payment of costs by the defendant.

(a) Cax v. Coleridge. Ante, on Convictions, 2d edit. by Dowvol. ii., 86. 1 B. & C. 37. Paley ling, 27, n. (1).

## THORPE v. COOMBE.

ASSUMPSIT on a promissory note, made by the defendant in the year 1810, "payable two years after de-Pleas, 1, Non-assumpsit; 2, The Statute of Limitations. At the trial before Abbott, C. J., at the London sittings after last term, it appeared that the note was presented to the defendant, and payment demanded for the mitations did first time, on the 18th June, 1823. The defendant said something about interest due on the note, and promised that two years after he would write to his sister, the plaintiff's wife, about it. Other applications were made to the defendant before action brought for payment of the note, but without The action was commenced in Michaelmas term last. The jury, under the learned Judge's directions, found for the plaintiff.

Scarlett now moved to enter a nonsuit, on the ground that the Statute of Limitations was a bar to the action, inasmuch as it must be presumed after the lapse of thirteen years, that payment of the note had been before demanded, and the amount paid. He cited Holmes v. Kerrison (a), and Christie v. Tonseck (b).

BAYLEY, J.—I am clearly of opinion that the Statute of Limitations did not begin to run until two years after demand of payment of this note had been made. Here the cause of action did not arise until the two years after demand had elapsed, and consequently, the statute affords the defendant no protection. But after the evidence given in this case, there could be no ground for the jury to presume that there had been previous payment or satisfaction of the note.

The other Judges concurred.

Rule refused.

1826. Saturday, 27th May.

Where a promissory note was made payable " two years after demand:"-Held, that the Statute of Linot begin to run until the demand had elapsed.

Sir J. Mansfield cited from MS. (a) 2 Taunt. 323.

Selw. N. P. 126, ed. 3. (b) M. T. 52 Geo. 3, Cor.

1826. Thursday, 1st June.

of a deed signed it, sealed it, and declared, in the presence of the attesting witness, that he delivered it as his act and deed; but kept it in his own possession:-Held, that the deed was effectual from the moment of its execution, though there was no delivery of it to the grantee, or to any per-son for his

The grantor afterwards delivered the deed to a third person for the use of the grantee, intending to renounce all control over it. Such third person was not the agent of the grantee, nor did the grantee ever receive or know of the existence of the deed, till after the death of the grantor :—Held, that the deed was effectual from the moment of such delivery.

DOE on the demise of GARNONS v. KNIGHT.

The grantor EJECTMENT for certain lands and premises situate in the county of Flint. Plea, not guilty. At the trial, before Garrow, B., at the Staffordshire summer assizes, 1825, the case was this. Garnons, the lessor of the plaintiff, claimed title to the estate in question, as the mortgagee of a Mr. Wynne, a respectable attorney, residing at Mold, in the county of Flint. Wynne had been for many years concerned for Garnons, as his attorney, and in that character had, in the year 1814, sold an estate for him, the purchase-money for which he had received, but not paid over. Garnons lived about three miles from Mold. Wynne lived in Mold, and a sister and a niece of his lived in a house adjoining to his own. In the evening of the 12th of April, 1820, Wynne called at his sister's house, at a time when he knew his niece only was at home, and produced a parchment, which he requested his niece to witness. He laid the parchment on the table, signed his name to it, placed his finger on the seal, saying, "I deliver this as my act and deed," and then handed the parchment over to his niece, who signed her name to it; and he then put it into his pocket, and went In April, 1820, but whether before or after the execution of the deed above-mentioned did not distinctly appear, Wynne called upon his sister, and gave her a brown paper parcel, saying, "Here, Bess, keep this: it belongs to Mr. Garnons." A few days afterwards, he again called upon his sister, when he asked her for the parcel, which she returned to him. On some subsequent day, not exceeding the 16th of April, Wynne again called upon his sister, and gave her a parcel similar in general appearance, but somewhat smaller in bulk, to the former, saying, "Here; put this by." In August, 1820, Wynne died; and after his funeral, his sister delivered up the parcel to a Mr. Barker, in the same state as she had re-

ceived it. It was sealed, but not directed; and upon removing the brown envelope, a white one appeared, upon which was written, in Wynne's handwriting, "Richard Garnons, Esq.," and it contained the deed which was witnessed by Wynne's niece, being a mortgage from Wynne to Gernons, for 10,0001. This parcel also contained a paper, folded like a letter, and directed, in Wynne's handwriting, to Garnons, in which there was a statement of accounts between them, which stated that 10,000/., part of the balance due from Wynne to Garnous. was secured by a mortgage. The mortgage-deed was a mortgage of all Wynne's real estates, and was then delivered up to Garnons. At the same time Wynne's will was produced and read, by which he devised the whole of his property to the defendant, Mr. Knight, for the benefit of his creditors; and with the will there was a paper containing a statement of Wynne's assets and debts, and among the latter, was one of 10,000l. to Garnons, stated to be secured by mortgage. Some years before this, in 1814, Wynne called upon Barker, who was his intimate friend, and told him that he had received 26,000% on account of Gurnons, and that he still owed Garnons upwards of 13,000l.; and requested Barker to see Garnons, and explain the circumstances. Upon Barker's consenting to do so. Wynne gave him a written statement of his property, by which it appeared, that after paying all his debts, including that of 13,0001. to Garnons, there would be a large surplus. Barker saw Garnons, and by Wynne's desire, told him, that though he, Wynne, could not pay him at that time, he would take care to make him perfeetly secure; upon which Garnons desired Barker to tell Wynne, that he would not distress or expose him, but that he relied upon his providing him with security for the money he owed him: and this was communicated to Wynne, who expressed himself as very grateful, and repeated that he would take care and make Garnons perfeetly secure. This was the plaintiff's case, and there-

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upon it was contended, on the part of the defendant, that no interest passed to Garnons by the mortgage-deed; first, because there had been no sufficient delivery of it, either to the mortgagee, or to any person on his behalf; and second, because the deed was a voluntary conveyance, and fraudulent and void, either as against the creditors of the grantor, under the statute 13 Eliz., c. 5, or as against the defendant as a purchaser, which he would be proved to be, under the statute 27 Eliz., c. 4. The learned Judge overruled the objections, but reserved the points, and the defendant then proved the following case. May, 1820, Wynne, being indebted to the defendant, gave him a bond and mortgage upon his real estates as a security; and by his will devised to him all his estates, in trust, to sell them, and divide the proceeds among his creditors. Shortly before this, in April, 1820, Wynne procured a skin of parchment with a 121. stamp, and for two or three days afterwards remained shut up alone in his private room; locking the door whenever he had occasion to leave it. One day, a clerk entered the room, and observed that Wynne was writing upon a parchment. draft of the mortgage was prepared in the office, nor did Wynne ever mention any such thing. The whole of the deed was in the handwriting of Wynne. He had three clerks, and in the ordinary course of business, such a deed would have been prepared and executed in the office, and witnessed by the clerks. The learned Judge left it to the jury to say, first, whether the mortgage-deed to the lessor of the plaintiff, Garnons, was duly executed by Wynne; and, if so, second, whether the delivery of it by Wynne to his sister, was a good delivery. His Lordship added, that if the deed, after it had been formally executed, had been delivered by Wynne to any friend or agent of Garnons, that, in his opinion, would have been a good delivery, and would have vested in Garnons the interest intended to be passed by the deed; and that the question, therefore, was, whether Wynne delivered the deed to his sister,

intending to part with the power and control over it, and for the benefit of *Garnons*, and for the purpose of its being ultimately delivered to him; or whether he delivered it to her merely for safe custody, and intending to reserve the power and control over it: if the jury were of the former opinion, they would find for the plaintiff; if of the latter, for the defendant. The Jury found for the Plaintiff.

1826. Doe v. Kright.

Campbell, in Michaelmas term last, obtained a rule nisi for a new trial, and renewed both the objections taken at Nisi Prius.

W. E. Taunton, and G. R. Cross, shewed cause. The direction of the learned judge was right in point of law, and the finding of the jury was warranted in point of fact. It must be admitted, that delivery is essential to the perfecting of a deed; but it is not essential that it should be delivered to the party to be benefited by it. That appears even from Shepherd, the authority relied on by the other side, for he says, "A deed may be delivered to the party himself to whom it is made, or to any other by sufficient authority from him, or it may be delivered to any stranger for, and on the behalf, and to the use of him to whom it is made, without authority. But if it be delivered to a stranger without any such declaration, intention, or intimation, unless it be in a case where it is delivered as an escrow. it seems this is not a sufficient delivery(a)." The question is, what was the intention of the maker, and the law requires the formal act of delivery merely for the purpose of demonstrating that the maker intended the deed to be his act. A declaration of such intention, made in the presence of the attesting witness, at the time of the execution of the deed, is the best possible evidence of it, and amounts to an absolute and formal delivery by words. Now here, there has been such an absolute and formal delivery; and in that respect the present case differs from all those in

(a) Shep. Touch. 57.

Doe v. Kuigur.

which deeds have been held invalid by reason of an imperfect delivery. "A delivery may be made without any words: as, if he actually delivers a writing, after sealing it, to the party, without saying any thing. If he throws it upon the table, with an intent that the party shall take it; and he takes it accordingly. If he delivers it, as his deed, into the hands of a stranger. If it be wrote in a book, and he delivers the book. If a deed be to A., for the benefit of B, upon a marriage, a delivery to B, upon the day of marriage, saying, This will serve, and B. delivers it to A., shall be a good delivery to A. So, a delivery may be by words only, without an actual delivery; as, if the writing lies upon the table, and the obligor says to the obligee, "Take it up, it is sufficient for you." Or, "Take it as my deed" (a). The instances here put are authorities to shew that there may be a formal, or a constructive delivery of a deed; and that the distinction between the one and the other is this: If the party at the time of executing the deed, uses words denoting his intention that it shall from that moment operate as his deed, that is a formal delivery; but if he denotes that intention, not by words, but by some act equivalent to words, that is a constructive delivery. It is the intention of the party executing the deed, which constitutes his act a delivery, Stauston v. Chambers (b), where it is said, "The obligor seals obligation, and throws it upon the table, without other circumstances; this is not a delivery. But if he throws it towards the obligee, or if the obligee immediately takes it, and the obligor says nothing, it is a delivery." In Thorowgood's case (c) this is said :- "In 19 Hen. 8, 8 a, a difference is taken when a writing is delivered to the party himself, and when to a stranger, as it was there agreed, that a writing may take effect by actual delivery to the party himself, without any words; and as a writing may take effect by actual delivery without words, so it may

<sup>(</sup>a) Com. Dig. Fait. (A. 3).

Litt. 35 a.

<sup>(</sup>b) Hal. MSS. Note to Co.

<sup>(</sup>c) 9 Rep. 137.

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take effect by words without actual delivery; as if a writing is sealed, and it lies in a window, or upon a table, and the obligor saith to the obligge, "See, there's the writing, take it as my deed;" and he takes it accordingly, it is a good delivery in law. Lord Coke also mentions the distinction between delivery to the party, and to a stranger, in his Commentary (a), where he says :-- " If a man deliver a writing scaled, to a party to whom it is made, as an estrow to be his deed upon certain conditions, &c., this is an absolute delivery of the deed being made to the party himself; for the delivery is sufficient without speaking of any words (otherwise, a man that is mute could not deliver a deed), and tradition is only requisite: and then when the words are contrary to the act which is the delivery, the words are of none effect, non quod dictum est, sed quod factum est, inapicitur. But it may be delivered to a stranger, as an escrow, &c., because the bare act of delivery to him without words worketh nothing." In Chayton's Reports, 31, it is said, "If A. deliver a deed made to J. S., to J. D., though he do not say, to the use of J. S., yet this is a good delivery of the deed to J. S., if he accept of Again, in Comyn's Digest, it is said, "If it be delivered as his deed, to a stranger, to be delivered to the party upon performance of a condition, it shall be his deed presently; and if the party obtains it, he may sue before the condition performed" (b). The result of these authorities is, that the law regards the delivery of the deed, whether done with or without words, whether formal or constructive, as evidence of the intention of the party to be from thenceforth bound by it as his act and deed; and that where that intention is indicated, either by words or acts, the delivery is complete, and the deed binding from that moment. Now, in this case, there was an absolute and formal delivery of the deed, as a deed, in the presence of the attesting witness, on the 12th of April; but if not. the second delivery of it to Miss Wynne was a good deli-

<sup>(</sup>a) Co. Litt. 36 a.

<sup>(</sup>b) Com. Dig. Fait. (A 3).

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<sup>(</sup>a) Prec. Ch. 211.

<sup>(</sup>c) Cited in Clavering v. Clavering.

<sup>(</sup>b) Prec. Ch. 235. 2 Vern. 473,

<sup>(</sup>d) 5 T. R. 420.

<sup>1</sup> Bro. P. C. 122.

<sup>(</sup>e) 6. East, 275.

which he has raised to Garnons' security are equally applicable to his own. And besides, Garnons, as a mortgagee, must be regarded as a purchaser for value, and then the deed under which he claims is not within the statute.

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Campbell, and W. O. Russell, contrà. First, there was no delivery of the deed at all, on the 12th of April. Second, the subsequent delivery to Miss Wynne, was not a perfect delivery. Third, the deed is void, both under the 13 Eliz., c. 5, and the 27 Eliz., c. 4. First, "a deed takes effect only from tradition or delivery," 2 Bl. Comm. 307; Grendit v. Baker (a), Chamberlain v. Stanton (b), Perkins 137. "A deed may be delivered to the party himself to whom it is made, or to any other by sufficient authority from him, or to any stranger for, and on the behalf, and to the use of him to whom it is made, without authority. But if it be delivered to a stranger, without any such declaration, intention, or intimation, this is not a sufficient delivery." Shepherd's Touchstone, 57. "If a man deliver a writing, sealed, to the party to whom it is made, as an escrow to be his deed upon certain conditions, &c., this is an absolute delivery of the deed being made to the party himself, for the delivery is sufficient without speaking of any words; but it may be delivered to a stranger as an escrow, &c., because the bare act of delivery to him without words, worketh nothing. And, as a deed may be delivered to the party without words, so may a deed be delivered by words, without any act of delivery, as if the writing sealed lieth upon the table, and the feoffor or obligor saith to the feoffee or obligee, 'Go, and take up the said writing, it is sufficient for you; or 'it will serve the turn; 'or, 'take it as my deed;' or the like words, it is a sufficient delivery." Co. Litt. 36, a. These authorities shew the distinction between delivery to the party, and delivery to a stranger, and prove, that delivery to a (b) Cro. Eliz. 122. (a) Yelv. 7.

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stranger without words, that is, without some express declaration that the deed is delivered for and to the use of the party, and some unequivocal expression of the intention of the maker to be bound by it, is not sufficient. Now, on the 12th of April, there was clearly no delivery, either to the mortgagee himself, or to any authorised agent of his, or to any person for him and to his use; therefore, there was no delivery at all. All that took place then was, the execution of the deed, for Wynne never for a moment parted with possession of it; the name of Garnons was never mentioned, and the contents of the deed were never made known to the attesting witness. Wynne, indeed, used the expression, "I deliver this as my act and deed," which, if Garnons had been present, would have been sufficient, but which in his absence was insufficient, without going on to say, "for the use of Garnons," and without handing it over to the attesting witness accordingly. For this, Shelton's case (a) is an authority. That case is thus stated:--" Lessee for years grants his term by deed, and sealeth it in the presence of divers, and of the grantee himself; and the deed at the same time was read. but not defivered, nor the grantee did not take it, but left it behind them in the same place. Yet the opinion of all the justices was, that it was a good grant, for the parties came for that purpose, and performed all that was requisite for the perfecting it, except an actual delivery; but it being left behind them, and not countermanded, it shall be said a delivery in law." The transaction of the 12th of April did not amount to a delivery within any of the cases cited from Comyn's Digest(b), because it was neither a delivery to the party himself, or to his authorised agent, or into the hands of stranger, the attesting witness, to his use. Nor is it like the case put in 2 Rol. " If A. make an obligation to J., Abr. Fait., (K. 1. 42), and delivers it to B., if J. gets the obligation, he may have an action upon it, for it will be intended that B. took

<sup>(</sup>a) Cro. Eliz. 7.

<sup>(</sup>b) Com. Dig. Fait. (A 3).

the deed for him as his servant;" for there the deed is delivered to an authorised agent: here it is not delivered to any person at all. Nor is it like the case of Parker v. Tenant (a), where it is said, "If a deed be to A., for the benefit of B., upon a marriage, a delivery to B., upon the day of marriage, saying, 'this will serve,' and B. delivers it to A., shall be a good delivery to A.;" because, there B. must be regarded as the authorised agent of A. must be admitted that there are some cases in Equity, in which it has been held, that a deed was binding, though it had neither been delivered to the party himself, or to any other person for his use, Barlow v. Heneage (b), Clavering v. Clavering (c), and Sear v. Ashwell (d); and that such decisions at first sight appear strongly opposed to the present argument. The answer to these, however, is, that they are cases in Equity, and therefore that the party in each of them must have conceded that the instrument was binding, by going into a Court of Equity for relief, for otherwise, he would have had a remedy at law. Boughton v. Boughton (e), where the question was, whether the deed was revoked by the will, the formal execution of the deed was admitted; the deed there, therefore, must be taken to have been duly signed, sealed, and delivered, for otherwise, it could not properly be said to be formally executed. In Worral v. Jacob (f), where it was admitted that the deed had been duly executed, the same inference arises; and, therefore, cases of that kind are no authorities for saying that delivery is not a necessary ingredient in the validity of a deed. In Naldred v. Gilham (g), the case states, that Mrs. Naldred, by indenture, settled the premises; and she could not possibly have settled an estate by deed, unless that deed was in all respects duly executed. Of all the cases upon this subject, Clavering v.

(a) Dyer, 192. Com. Dig. Fait. (A. 3).

(d) 3 Swanst. 411.

(e) 1 Atk. 625.

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<sup>(</sup>b) Prec. Ch. 211.

<sup>(</sup>f) 3 Meriv. 256.

<sup>(</sup>c) Prec. Cha. 235. 2 Vern.

<sup>(</sup>g) 1 P. Wms. 577.

<sup>473. 1</sup> Bro. P. C. 122.

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Clavering is the only one in which it does not appear as a fact, that the deed was duly executed, and Cotton v. King (a), is an therefore, duly delivered. authority in favour of the defendant. There Lady Cotton, being about to enter into a second marriage, executed deeds conveying certain property to her children by her first marriage, and deposited them with the person by whom they were prepared, saying, "I have done this for the sake of my children." The Lord Chancellor said, "As to the Lady Cotton, if she had executed these deeds, and kept them in her own hands, or custody, and they had been got from thence, I do not think she should have been bound by them; so, if they had been placed in the hands of her agent, for her agent's are her hands." Taw v. Bury (b), is not applicable to this case, because there the obligor parted with the possession of, and all control over, the bond. In Murray v. Earl Stair(c), where a bond, executed with the usual formalities, was delivered (by mutual agreement between the obligor and the obligee), into the hands of the subscribing witness. there to remain until the death of A., who was named in the condition, 'and until certain securities were returned to the obligee;' it was held, that it was for the jury to determine whether the bond was delivered as an escrow or as a deed." It has been held to be a delivery as an escrow, where a party executes a deed, which is to be void in case certain circumstances do not take place; as, where a surety executed a composition deed, in the usual form, as his act and deed, which was to be void if all the creditors did not sign it; this was held to be a delivery as an escrow; and as all the creditors had not signed it, void. Johnson v. Baker (d). In Wilson v. Balfour (e), "Bankers having fraudulently sold out stock belonging to a customer, which stood in their names, and applied the proceeds to their

<sup>(</sup>a) 2 P. Wms. 357.

<sup>(</sup>d) 4 B. & A. 440. See Holmes

<sup>(</sup>b) Dyer, 167.

v. Love. Ante, vol. v., 56.

<sup>(</sup>c) Ante, vol. iii., 278, 2 B. & C.

<sup>(</sup>e) 2 Camp. 579.

own use; while they remained solvent wrapped up certain bonds belonging to them in an envelope inscribed with the customer's name, and inclosing a memorandum, stating, that they had deposited the bonds with him as a collateral security for his stock, which they promised to replace. This parcel they in fact deposited among the securities of other persons who dealt with them, but gave no information of any of these circumstances to the customer, until the eve of their bankruptcy, when they sent him the parcel with the bonds, saying, they must stop payment next morning. It was held, that the customer could not retain the bonds against the assignees of the bankers." and Lord Ellenborough said, "they only intended to deliver the bonds to the defendant. The whole rested in intention. The possession was never put out of them-Noble was no agent of the defendant for the purpose of receiving the bonds. The defendant was entirely ignorant of the transaction." So here, the whole rested in intention. The possession was never out of Wynne. No agent of Garnons received the deed for him. Garnons was entirely ignorant of the transaction. Secondly, the delivery of the deed by Wynne to his sister, was not a good delivery. Upon the evidence the probability is, that the first parcel delivered to the sister did not contain this deed; but if it did, the fact of Wynne's getting it back from her, and keeping it in his own possession for several days, without any resistance or remonstrance on her part, is conclusive to shew that the sister was merely the agent of her brother, and that both parties understood that he intended to reserve to himself the power and control over the parcel. Wynne afterwards delivered it to his sister a second time, but then nothing was said about Garnons, nor was it directed in his name: and if he had intended the deed to operate in his lifetime, he would have taken the easiest and most effectual means of providing that it should, by handing it himself to Garnons, which he had constant opportunities of doing.

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Instead of that, he reserves a power and control over the deed; and he must, therefore, be taken to have employed his sister as his own agent, and not as the agent of Gernons. The jury have, indeed, negatived the reservation by Wynne, of the possession and control over the deed; but their verdict is not warranted by the evidence in that respect. Third, the deed is void, under the 13 Eliz., c. 5. against creditors, and under the 27 Eliz., c. 4, against the defendant as a subsequent purchaser; for it is a fraudulent deed within both those statutes. It was a secret appropriation of property in favour of one creditor to the prejudice of the rest, and being never handed over to any one to hold for Garnons, but remaining within the power and control of the grantor, it was fraudulent. At least the question whether it was or was not a fraud upon the other creditors, ought to have been left to the jury, which it was not. It was quite clear that Wynne was in insolvent circumstances at the time when he executed the deed, therefore in so doing he committed an act of bankruptcy; Hassels v. Simpson (a); and it is no answer to that objection to say that he did it for a valuable consideration; Cadogan v. Kennett (b).

The case was argued at the sitting in Banc after last Hilary term, when the Court took time for consideration. Judgment was now delivered by

BAYLEY, J., who after stating the nature of the action, and the facts of the case, thus proceeded. My brother Garrow, who tried this case, left two questions to the jury: first, whether the mortgage was duly executed, and second, whether the delivery to the sister was a good delivery: and he explained to them, that if the delivery was a parting with the possession, and of the power and control over the deed, for the benefit of Garnous, for the purpose of its being delivered to him, either in Wynne's lifetime, or after his death, the delivery was good; but that, if it was delivered only for safe custody for Wynne,

and subject to his future control and disposition, it was not a good delivery, and they ought to find for the de-The jury found for the plaintiff. Their opinion, therefore, was, that Wynne parted with the possession, and with all power and control over the deed; and that his sister held it for Garnons, free from the control and disposition of her brother. It was urged in argument, that there was no evidence to warrant that finding, and that the conclusion which the jury had drawn had no premises on which it could be supported. But, is this objec-Why did Wynne part with the possession to his sister, except to put the deed out of his own control? Why did he say to her, when delivering the first parcel to her, "It belongs to Garnons?" Did he not mean her to understand that she was to hold the parcel for Garnons' use? And though she did return the parcel to her brother when he asked for it, would she not have been justified if she had refused? Might she not have said, "You told me it belonged to Garnons, and I can part with it to no one but Garnons, or some one authorised by him to receive it?" The finding of the jury, therefore, appears to us to be well warranted by the evidence, and then there are two questions upon the first point; one, whether, when a deed is duly signed and sealed, and formally delivered with apt words of delivery, but is afterwards re-delivered to and retained by the party executing it, that re-delivery and retention will obstruct the operation of the deed; the other, whether a delivery to a third person is sufficient, where such delivery puts the instrument out of the power and control of the party who executed it, though such third person does not pass the deed to the party who is to be benefited by it, until after the death of the person by whom it was executed. Upon the first question, whether a deed will operate as a deed, though it is never parted with by the party who

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In Barlow v. Heneage (a), George Heneage executed a

(a) Prec. Ch. 211.

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executes it, there are many authorities to shew that it will.

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deed, purporting to convey an estate to trustees, that they might receive the profits, and put them out for the benefit of his two daughters, he giving a bond to the trustees conditioned to pay them 1000l., in trust for each of his daughters, on a certain day: but he kept both the deed and the bond in his own possession, and received the profits of the estate till he died. By his will he noticed the bond, and gave legacies to his daughters in full satisfaction of it; but the daughters elected to have the benefit of the deed and the bond, and filed a bill in equity accordingly. was argued, that the deed and bond being voluntary, and always kept by the father in his own hands, were to be taken as a cautionary provision only; but Lord Keeper Wright said, "these were the father's deeds, and he could not derogate from them;" and the parties having agreed to set the maintenance of the daughters against the profits received by the father, the decree was, that interest was to be paid on the bond, from the date of the condition. Clavering v. Clavering (a), Sir James Clavering settled an estate upon one son in 1684, and upon another son in 1690; the same estate in both instances. He never delivered or made known the settlement of 1684 to any person, but kept it in his own power, and it was found after his death among his waste papers. A bill was filed under the settlement of 1690, for relief against the settlement of 1684; and Lord Keeper Wright held that the relief could not be granted; observing, that though the settlement of 1684 was always in the custody and power of Sir James. that did not give him power to resume the estate: and he dismissed the bill. In Lady Allison's case, cited by Lord Keeper Wright, a father, having had differences with his son, executed a deed, giving to his wife an addition to her jointure of 100%, a year; he kept the settlement in his own power, and on being afterwards reconciled to his son, he cancelled it. The wife found the deed after his death, and on trial at law, the deed was proved to have been executed, and was held good, though cancelled, and the son

<sup>(</sup>a) Prec. Ch. 235. 2 Vern. 273. 1 Bro. P. C. 112.

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having filed a bill in equity for relief against the deed, Lord Somers dismissed the bill. In Naldred v. Gilham (a), Mrs. Naldred, in 1707, executed a deed, by which she covenanted to stand seised to the use of herself, remainder to a child, then three years old, her nephew, in fee. kept the deed in her own possession, and afterwards burned it, and made a new settlement. A copy of the first deed having been, surreptitiously, obtained before it was burned, a bill was filed to establish the copy, and to have the second settlement delivered up; and Sir Joseph Jekyll with great clearness determined in favour of the plaintiff, and granted a perpetual injunction against the defendant, who claimed under the second settlement. Lord Chancellor Parker reversed that decree: not on the ground that the deed was not well executed, or not binding because Mrs. Naldred had kept it in her own possession; but on the ground that it was plain that she intended to keep the estate in her own power; that she designed that there should be a power of revocation in the deed; that she thought that while she had the deed in her custedy, she had the estate at her command; and that she had been imposed upon by the deed having been made an absolute conveyance, which was unreasonable, when it ought to have contained a power of revocation; and because the plaintiff, if he had any title, had it at law, and could not seek relief in a court of equity. Lord Parker's decision, therefore, is consistent with the position, that a deed in general may be valid, though it remains under the control of the party who executed it; and so it was clearly considered in Boughton v. Boughton (b). case, a voluntary deed had been made without a power of revocation, and the maker kept it by him; and Lord Hardwicke considered it as valid, and acted upon it; and he distinguished that case from Naldred v. Gilham, which he said was not applicable to every case, but depended on its own peculiar circumstances: and he described Lord Macclesfield as having stated, as the ground of his decree,

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that he would not establish a copy surreptitiously obtained, but would leave the party to his remedy at law; and that the keeping the deed, of which there were two parts, implied an intention of revoking, or rather of reserving a power to revoke. On these authorities it seems to us, that where an instrument is formally sealed and delivered, and there is nothing to qualify the delivery, except the keeping the deed in the hands of the executing party, and nothing to shew that he did not intend it to operate immediately; it is a valid and effectual deed, and delivery to the party who is to take under it, or to any person for his use, is not essential.

But, assuming this point to be doubtful, can there be any question that a delivery to a third person, for the use of the party in whose favour it is made, where the grantor parts with all control over the deed, makes the deed effectual from the instant of such delivery? The law will presume, if nothing appears to the contrary, that a man will accept what is for his benefit; that was laid down as a rule by Lord Ellenborough, in Stirling v. Vaughan (a); and in this case there was strong ground for presuming Garnons' assent, for there was his declaration that he relied and expected that Wynne would provide him security for his money, and Wynne had given an answer importing that he would. Shepherd, in his Touchstone, who is particularly strict in requiring that the deed should pass from the possession of the grantor, and, indeed, more strict than the cases I have quoted imply to be necessary, lays it down, that delivery to the grantee shall be sufficient, or to any one he has authorised to receive it, or to a stranger for his use and on his behalf (b); and 2 Roll. Abr. (k.) 24. Pl. 7, Taw v. Bury (c), Alford v. Lea (d), and Butler and Baker's case(e), are clear authorities to shew, that if there is a delivery to a stranger, for the use and on the behalf of the grantee, the deed will operate instanter, and its opera-

<sup>(</sup>a) 11 East, 623.

<sup>(</sup>d) 2 Leon. 111. Cro. Eliz. 54.

<sup>(</sup>b) Shep. Touch. 57.

<sup>(</sup>e) 3 Rep. 26 b.

<sup>(</sup>c) Dyer, 167, b. 1. Anders. 4.

tion will not be postponed until it is delivered over to, or accepted by the grantee. The passage in 2 Roll. Abr., is this:-- "If a man make an obligation to I., and deliver it to B., if I. get the obligation, he shall have action upon it, for it shall be intended that B. took the deed for him as his servant. 3 H., 6, 27." The point is put arguendo by Paston, Serjt. in 3 H. 6, and he adds, "for a servant may do what is for his master's advantage, what is to his disadvantage, not." In Taw v. Bury, an executor sued upon a bond; the defendant pleaded that he caused the bond to be written, sealed, and delivered, to one B. C., to deliver it to the testator as his, the defendant's, deed; that B. C. offered to deliver it to the testator as the defendant's deed, but the testator refused to accept it as such; whereupon, B. C. left it with the testator as his schedule, and not as the defendant's deed, and so, non est factum. On demurrer on this and on another ground, it was held by Sir H. Brown and Duer, J., that, first, by the delivery of the deed to B. C. without speaking of it as the defendant's deed, the deed was good, and was in law the deed of the defendant before any delivery over to the testator, and then the testator's refusal could not undo it as the defendant's deed from the beginning; and judgment was given for the plaintiff, "Very much," says Dyer, "against the opinion of Sir A. Brown, but others of the King's Bench agreed with that judgment. But the judgment was reversed in the King's Bench, in Hilary, 3 Eliz., but that was for discontinuance in the pleadings, and not for matter of law." Sir A. Brown's doubt might be grounded on this: that the delivery to B. C. was conditional, if the testator would accept it; and if so, it would not invalidate the position, which alone is material here, that an unconditional delivery to a stranger for the benefit of the grantee, will enure immediately to the benefit of the grantee, and will make the deed a perfect deed, without any concurrence by the grantee. This is further proved by the case of Alford v. Lea. That was debt on an arbitration bond. The award directed,

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that before the feast of St. Peter, both parties should release to each other all actions. The defendant executed a release on the eve of the feast, and delivered it over to B. for the use of the plaintiff; but the plaintiff did not know of it till after the feast, and then he disagreed to it. that would not be a performance of the condition, unless there was a good delivery before the time limited by the award for making that delivery; and before that time itdid not reach the possession or knowledge of the party in whose favour it was made. Whether this was a performance of the condition, was the question. It was argued that it was not, for the release took no effect until the agreement of the releasee. It was answered, it was immediately a release, and the defendant could not plead non est factum, or countermand it, and the plaintiff might agree to it when he pleased. It was adjudged to be a good performance of the condition, no place being appointed for the delivery, and the defendant might not be able to find the plaintiff, and they relied on Taw's case. This, therefore, was a confirmation at the distance of 28 years, of the case of Taw v. Bury, and it was again confirmed, at a still later period, in Butler and Baker's case. there puts the point very clearly, thus :—" If A. makes an . obligation to  $B_{\cdot,\cdot}$  and delivers it to  $C_{\cdot,\cdot}$  to the use of  $B_{\cdot,\cdot}$ this is the deed of A. presently; but if C. offers it to B., there B. may refuse it in pais, and thereby the obligation will lose its force, (but perhaps in such case A., in an action, brought on this obligation, cannot plead non est factum, because it was once his deed); and therewith agrees Taw's case. The same law of a gift of goods and chattels, if the deed be delivered to the use of the donee, the goods and chattels are in the donee presently, before notice or agreement; but the donee may make refusal in pais, and by that, the property and interest will be devested, and such disagreement need not to be in a court of record. Note, reader, by this resolution you will not be drawn to error by certain opinions delivered by the way; without

premeditation, in 7 E. 4, 7, a. b, and 19 b., 8 E., 4, 29 a, 8 H. 7, 13, 39 H. 6, 44 b, and other books obiter." The same doctrine will be found in Bro. Abr. tit. Done et Remainder, pl. 29, 8 Vin. Abr. 488, and Wankford v. Wankford (a). Upon these authorities we are of opinion that the delivery of this deed by Wynne, and putting it in the possession of his sister, made it a good and perfect deed, at least from the moment when it was put into the sister's possession.

The remaining question is this:—Whether the deed must be considered void, as against creditors, under the 13 Eliz., c. 5, or as against the defendant as a purchaser. under the 27 Eliz., c. 42. As to creditors, there was no proof of outstanding debts at the trial; nor any proof of there being any creditor except the defendant, who may be regarded in the double character of creditor and purchaser. The facts in evidence as to him, were these :- that in May or June, 1820, Wynne delivered to his son a bond and mortgage for the defendant, and title deeds, which title deeds. and mortgage, related to the same premises to which Garnons' mortgage related. What the nature of the defendant's debt was did not appear, nor what was the consideration for the bond and mortgage. Whether any money was advanced when the bond and mortgage were given, or whether they were for a pre-existing debt; whether they were obtained by pressure on the part of the defendant, or given voluntarily and of his own motion by Wynne; are points upon which there is no proof. Under such circumstances, we cannot say that the defendant has made out a case to entitle him to treat Garnons' mortgage as void under either of the statutes. If he should hereafter be able to shew, that, as mortgagee, he was entitled to a preference, he will be at liberty to do so, and this judgment will not operate as any bar to his claim. For these reasons, we are of opinion that the rule for a new trial ought to be discharged.

Rule discharged.

(a) 1 Salk. 299, 301, per Gould, J.

Doe v. Knight. Thursday, 1st June. BURNETT and others, Executors of SIR ROBERT BURNETT, v. LYNCH.

In an action by lessee against assignee of a lease, if the defendant produces the lease, it is unnecessary to prove the due execution of it, where the plaintiff has proved the due execution of the counterpart.

Case (not covenant), lies by the assignor, against the assignee of a lease, assigned by deed poll, upon his implied duty to perform the covenants in the original lease, although the assignor has by the assignment parted with all his interest. And although assumpsit might lie, case was the better form of action for the injury sustained by the assignor in consequence of the assignee's breaches of covenant.

The declaration stated that plaintiffs, as executors of Sir R. Burnett, before the making of the assignment, and also, before the committing of the grievances thereinafter mentioned, to wit, on, &c., at, &c., were lawfully possessed for the residue of a certain term, whereof at the time of making such assignment seven years were unexpired, of and in certain premises, with the appurtenances, together with the use of certain household goods, furniture, fixtures, and other things, mentioned in a schedule or inventory, annexed to an indenture of demise or lease thereof, made to Sir Robert Burnett, by O. P. Meyrick, Esq., bearing date the 30th August, 1804, under and subject to certain rents and certain covenants therein contained by Sir Robert Burnett, his executors, administrators and assigns to be performed. Of such covenants, the following were set out in the declaration:--"To paint the outside woodwork of the house, and the iron railing, &c., once in every five years, to repair during the term, and to yield up the premises sufficiently repaired, at the expiration of the term, and to keep in proper order and condition, the garden and gravel walks, preserve the fruit trees therein, and to replace such shrubs and fruit trees as might die or decay, with others of an equally good or better sort, and at the end of the said term, leave the garden walls properly planted with fruit trees, and the kitchen garden ground properly planted with vegetables and roots." The declaration then averred, that of these covenants the defendant had notice, and then went on to state, that plaintiffs being so possessed of the demised premises, afterwards, and before the committing of the grievances by the defendant, as thereinafter mentioned, to wit, on the day and year last aforesaid, at, &c., at the

request of the defendant, all the estate and interest of the plaintiffs, of and in the demised premises with the appurtenances, was duly assigned to the defendant, to hold to him, his executors, administrators and assigns, from the 29th September, 1817, for the residue of the term by the indenture demised as aforesaid, under and subject to the payment of the rents thereby reserved, and to the performance of the covenants therein contained on the part and behalf of the said Sir Robert Burnett, since deceased, his executors, administrators and assigns, from the said 29th day of September, 1817, to be performed and kept. By virtue of which assignment, the defendant entered into and upon the said demised premises, and was possessed thereof for the residue of the term, so to the said Sir Robert Burnett demised, and continued so possessed thenceforth, for a long space of time, to wit, unto the end and expiration of the term so demised as aforesaid, to wit, at, &c., whereupon it then and there became and was the duty of the defendant, as such assignee of the demised premises, from the 29th day of September, 1817, to perform all and singular the rents and covenants in the said indenture contained, for and during so much of the residue of the term as he, the defendant, should remain possessed of the demised premises as such assignee as aforesaid; nevertheless, the plaintiffs say, that the defendant, not regarding his said duty in that behalf, but contriving and intending to injure the plaintiffs in this behalf, did not, nor would after he became possessed of the said demised premises, and after the said 29th September, 1817, during the time he remained and continued possessed of the said demised premises, as such assignee thereof, at his own cost and charges, in a good and effectual manner, once in every five years of the said residue of the said term, paint all the wood-work of the outside of the said mansion-house, and offices, &c., but on the contrary thereof, suffered the premises to be out of repair, whilst he was assignee, and so to continue for a long space of

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time, to wit, until, and at the end and termination of the demised term. By reason whereof, and of the said several breaches of covenant, the said O. P. Meyrick in Hilary term, in the fifth year of the reign of our Lord the now king, in the court of King's Bench, at, &c., impleaded the plaintiffs as such executors in a plea of breach of covenant, for the damages sustained on occasion of such several breaches of covenant as aforesaid; and such proceedings were thereupon afterwards had in the said action, that in Easter term, in the sixth year of the reign of our Lord the now king, it was by the said court considered that the said O. P. Meyrick should recover, and the said O. P. Meyrick recovered against the plaintiffs as such executors, 1,1651. for his damages, as well by reason of the said several breaches of covenant, as for his costs and charges about his suit, in that behalf expended. means of all which said several premises, the plaintiffs as such executors, were forced and obliged to pay, and afterwards, to wit, on, &c., at, &c., did actually pay the said sum of 1,165l. so recovered against them as such executors, and were necessarily put to and incurred certain costs and charges, amounting to 500l., in and about their defence in the said action, to wit, at, &c., to plaintiffs' damage, as such executors, as aforesaid, of 2,000l. Plea, not guilty, and issue thereon. At the trial, before Best, C. J., at the last summer assizes for the county of Surrey, the plaintiffs set out by proving that the original lease granted by Mr. Meyrick to Sir R. Burnett, had been delivered to the defendant. They next produced the counterpart, and proved the due execution of it, by calling the subscribing witness. The original lease was then put in by the defendant's counsel, it having been produced by the attorney of a Mr. Daniel, to whom it had been assigned by the defendant, by a deed reciting the lease. The plaintiffs' counsel then proposed to read the original lease, without calling the subscribing witness, which was objected to on the other side, on the authority of Gordon

v. Secretan(a); but the learned Judge was of opinion, that, as the lease came out of the hands of a person to whom the defendant himself had assigned it, that was sufficient to dispense with the necessity of proving its due execution; and accordingly the lease was read in evidence. It further appeared, that on the 5th September, 1817, the plaintiffs, as executors of Sir R. Burnett, had, by deed-poll, assigned the lease to the defendant, subject to the payment of the rent reserved, and the performance of the covenants contained in the lease; that the defendant assigned his interest in the lease to Mr. Damel, on the 28th September, 1824, only two days before the term expired; and that Daniel had been let into possession of the premises in 1819, and continued in possession till the term expired. Upon this evidence it was objected, that the plaintiffs had failed in proving the most material allegation in the declaration, namely, "that the defendant continued possessed of the demised premises, until the end and expiration of the term;" and that unless such averment was strictly proved, the plaintiffs could not recover in this form of action, which was case, and not covenant. The learned Judge, however, overruled the objection; and upon proof of the damages sustained, a verdict was found for the plaintiffs, damages 1,3501.

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Taddy, Serjt., in Michaelmas term last, obtained a rule nisi, either for a new trial, or to arrest the judgment, on two grounds, first, that the lease had not been duly proved; and second, that supposing the defendant liable at all, the form of action had been misconceived, inasmuch as it ought to have been either covenant or assumpsit, and not case (b).

Marryat, Barnewall, and Starr, now shewed cause. This being an action by the executors of the original lessee (a) 8 T. R. 548.

<sup>(</sup>b) The objection as to the variance which was taken at the trial, was renewed. on moving for a new trial, but overruled by the Court.

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against the assignee of the term, the first question is, whether the lease to the testator was well proved at the trial. It is submitted, that, as against this defendant, proof of the due execution of the counterpart of the lease was quite sufficient, it appearing in evidence that the original was assigned to the defendant. But, beside this, as the original came out of the hands of the defendant, or of a person over whom he had control, and who derived a. beneficial interest from him, proof of the execution of it became quite unnecessary. It is an established principle, that where an instrument is produced by a person who derives a beneficial interest under it, proof of its execution is dispensed with. The cases of Pearce v. Hooper (a), and Orr v. Morrice (b), are clear authorities upon this point. But it is incompetent to the defendant to dispute the due execution of this lease, inasmuch as in his deed of assignment to Daniel he has recited it, which is a decisive acknowledgment that it was duly executed; Burleigh v. Stibbs (c), Ford v. Gray (d), Doe v. Davis (e). It being clear, therefore, that the ground suggested for a new trial has failed, the question is, whether the motion in arrest of judgment is tenable. That resolves itself into the question, whether the plaintiffs are entitled to maintain an action on the case, for damages sustained under the circumstances disclosed in the declaration. Now it is clear, that an action of covenant would not lie, because the defendant had not become bound by the deed of assignment to observe the covenants contained in the original lease. Co. Litt. 363 b. Fitzh. N. B. 145. Com. Pig. Covenant [A. 1]. Brett v. Cumberland (f). would assumpsit lie? for it will be contended on the other side, that this action should have been framed either in covenant or assumpsit. It is very immaterial to the plaintiffs whether assumpsit will or will not lie, because

<sup>(</sup>a) 3 Taunt. 60.

<sup>(</sup>c) 5 T. R. 465.

<sup>(</sup>b) 2 J. B. Moore, 513. 3 B.

<sup>(</sup>d) 1 Salk. 285.

<sup>&</sup>amp; B. 139. See Gow. N. P. C.

<sup>(</sup>e) 7 East, 363.

<sup>26.</sup> 

<sup>(</sup>f) Cro. Jac. 521.

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the most proper form of action is case. That such an action is maintainable cannot be disputed; it is founded upon the principles of common law and common sense. Here the defendant has accepted the lease upon the terms of performing the covenants therein contained, and having wrongfully neglected to perform them, and the plaintiffs having become damnified by his laches, they have a clear right of action against him, upon his implied promise to perform the duty thus imposed upon him. The declaration, in this case, is founded on a legal duty, which the common law will imply, without any express agreement; and the case of Staines v. Morris (a), is an authority to shew, that this defendant, as assignee, must be considered as having taken the premises, subject to the performance of the covenants contained in the original lease. clear that the defendant is liable in some form of action; and that which is most suitable to the circumstances here disclosed, is a special action on the case, founded upon the defendant's common law liability for an implied breach of duty.

Taddy, Serjt., and Platt, contrà. First, as to the motion for a new trial, it is submitted that the subscribing witness ought to have been called to prove the due execution of the lease, inasmuch as the defendant's interest under it had ceased at the time the cause of action accrued. The lease did not come out of the defendant's hands, but out of the hands of a third person over whom the defendant had no control, and therefore, as this is a case within the general rule, the subscribing witness ought to have been called; Pearce v. Hooper (b); Orr v. Morrice (c). Secondly, as to the motion in arrrest of judgment; this action ought to have been framed either in covenant or assumpsit, and not in case. It seems clear that case is not the proper form of action, because, here the plaintiffs have no interest

<sup>(</sup>e) 1 Ves. & Beames, 8. (b) 3 Taunt, 60. (c) 3 B. & B. 139.

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whatever which entitles them to maintain such an action against the defendant for waste. There is no duty which the defendant owed to the plaintiffs, inasmuch as they had parted with the whole of their interest by assignment, and therefore case will not lie. It is true that an action on the case in the nature of waste might lie by the owner of the inheritance, upon which principle the case of Kinlyside v. Thornton (a) was decided; but not in this instance, where the plaintiffs have assigned all their interest. [Bayley, J. Suppose the plaintiffs, after the assignment, had been forced by the lessor to pay the rent, might they not have brought an action on the case against the defendant, alleging in their declaration that it became and was the duty of the defendant, to pay the rent from time to time, but that he neglected his duty in that respect? Would not such an action lie, on account of the personal injury to the plaintiffs, although the reversion remained in another? Here there is no duty owing by the defendant to the plaintiffs, because all privity between him and them In order to make the defendant liable to the has ceased. plaintiffs, there ought to have been an express agreement, such as a bond of indemnity for any neglect to perform the covenants in the lease; but in the absence of any such agreement, this form of action does not lie. [Bayley, J., If I lend a man a horse, there is a duty imposed upon him to return it, and may I not have an action on the case if he neglects to return it?] There can be no duty owing from the assignee to the assignor of a lease, but what arises upon the agreement between the parties; and here there is none. In Jones v. Hill (b), it was held that an action on the case for permissive waste is not maintainable against a tenant for years, if he holds under an express contract or covenant to repair. Then the action here ought to have been either in covenant or assumpsit. First, in covenant, because the lease was assigned to the defendant by deed, and the defendant having taken possession of (a) 2 Sir W. Blackstone, 111. (b) 7 Taunt. 391, 1 J. B. Moore, 100.

the premises, he is by implication of law bound to perform the covenants in the original lease. Roll Abr. 516, Co. Litt. 231 a, Dyer, 198. Second, assuming covenant not to lie, then assumpsit is the proper form of action, inasmuch as by entering into the beneficial enjoyment of the premises by virtue of the assignment, a promise may be implied on the part of the defendant to perform the covenants in the lease, and so to render himself liable to an action on the case ex contractu, and not ex delicto, the form here adopted.

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ABBOTT, C. J.—I am of opinion that the rule nisi obtained in this case must be discharged. First, as to a new trial, the ground of that application was, that although the lease made to the testator was produced either by the defendant or by a person claiming under him, it could not be read without calling the subscribing witness to prove the execution of it; but I am of opinion, that as against the present defendant, it was unnecessary, both with reference to the subject-matter of the lease, and with reference to the parties to call that witness. It was proved at the trial, that the plaintiffs' testator had executed a lease, and that the plaintiffs' executors had assigned that lease to the defendant Lynch, and that the defendant Lynch, had executed a deed assigning that lease to Daniel, which deed so executed by Lynch, recited the lease originally granted to the testator. That recital was, as it appears to me, as against Lynch, abundant evidence of the due execution of the original lease. Without going further, therefore, into that point, it appears to me, that on that short ground the lease was sufficiently proved. Then as to the other part of the rule, which relates to the arrest of judgment, the facts of the case appear to be these:—A lease had been granted to the plaintiffs' testator, whereby he had covenant to pay rent and perform the other covenants contained in the lease. The plaintiffs afterwards assigned the lease to Mr. Lynch, the defendant, and by voi. viii. 2 c



the terms of that assignment, Lynch was to hold, subject to the payment of the rent, and to the performance of the covenants of the original lease. Those were the terms. It is true, he enters into no express covenant or contract that he will pay the rent and perform the covenants, but he accepted the assignment on those conditions. First, then we are to consider whether any action can lie against him. If it be determined that no action will lie, then the consequence will follow, that a person having taken an assignment of a lease from another, subject to the payment of rent and the performance of certain covenants, and having thereby induced an understanding in that other, that he would pay the rent, and perform the covenants, will be at liberty to forego those obligations, and cast the burthen of them upon the other person. That is a proposition so repugnant to common sense and reason, that it would be a reproach to the law of England, which is the law of reason, if we were to hold that such a consequence would follow. Then, as some action will lie, the next question arises, what must be the form of the action? It has been contended that, if any action lies, it ought to be an action in the form of covenant. Now I do not think that an action of covenant could have been maintained, for an action of covenant is one of a particular technical nature. It cannot, by the law of England, be maintained, except against a person who by himself or some other person acting on his behalf, has executed a deed under seal, or who, under some very peculiar circumstances (such as those mentioned in Co. Litt. 231), has engaged by deed to do and perform certain acts. this case, it is clear that the defendant has not engaged by deed to perform the covenants, and therefore covenant will not lie. Then will an action of assumpsit lie? am asked my opinion, I think it will. But why? Because the defendant by taking the estate subject to the payment of rent, and the performance of the covenants, in the original lease, had made it his duty to pay the rent and

perform the covenants, and if by neglecting that duty a burthen was cast upon him from whom he took the estate, it seems to me that the law would imply a promise arising out of that contract of assignment, and upon that implied promise, the action of assumpsit would lie. by no means follows, however, that because a promise ' may be implied by law, this action on the case, which is founded on the breach of some duty from which the law implies a promise, may not also be maintainable. I think it may. The case of Kinlyside v. Thornton, is an authority for saying that either of those forms of action The only case to the contrary is that of Jones v. Hill (a). I cannot forbear observing, however, that the facts of that case bear a very close resemblance to the facts proved here, but I think the attention of the Court was not brought to the true ground on which the plaintiffs' case was founded, for I observe that the learned counsel, who moved to set aside the nonsuit in that case, put his argument altogether upon the ground that an action on the case would not lie for permissive waste, and that seems to have been the question there agitated. It is true, that the same learned counsel cited the case of Kinlyside v. Thornton, but it was not argued that by the acceptance of the assignment it became the duty of the assignee to do the very thing, the omission to do which was made the subject of complaint. The case was not at all put on that ground. Here, that ground has been taken, and I think that a duty did arise when the defendant accepted the assignment of the lease, subject to the performance of the covenants, and that as a breach of that duty has been committed, a special action on the case may be maintained. As, therefore, the case of Jones v. Hill, is no authority to govern our decision in the present case, I think this action may be maintained.

BAYLEY, J.—I agree that, on both points, this rule
(a) 7 Taunt. 392; 1 J. B. Moore, 100.

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must be discharged. My opinion with reference to the first, is founded on this, that the deed came out of the possession of the party, whom I consider as identified with the defendant. He claimed under him, and it was a deed under which the defendant and the party claiming under him, had taken all the interest which it professes to convey. My brother Taddy takes a distinction between this and the other cases cited in argument, namely, that this defendant no longer took any interest at the time the document was produced. But I do not think that is a material distinction. My opinion is, that if a party has taken under a deed all the interest which the deed is calculated to give, it is not competent for him to dispute the due execution of it, more especially where the instrument comes out of his own possession. Upon that short ground, I am of opinion, that the first part of the rule must be discharged. Upon the second point, it is not necessary for us to decide, whether covenant or assumpsit would lie in this particular case. There might be a difficulty, under certain circumstances, but I see no difficulty in saying, that in this case, an action on the case founded upon the tort will lie, on the ground, that from the facts stated in this declaration, the law raises a duty in the defendant to perform the covenants, and that duty having been broken by the defendant, and the plaintiffs being thereby prejudiced by it, they are entitled to maintain an action to recover a compensation in damages for the injury which the defendant's breach of duty has produced. In this case, . the defendant took the lease as the assignee of the plaintiffs, subject to the payment of the rent, and subject to the performance of certain covenants. To the payment of that rent, and the performance of those covenants, Sir R. Burnett, or his representative, in the character of lessee, was originally liable, and continued liable to the lessor. · The lessor would have the option from time to time of claiming payment of the rent, and a compensation for neglecting to repair the premises, either from the lessee.

or the assignee of the lessee. If he claimed from the assignee, the lessee could not be hurt, but if he claimed from the lessee, why then the latter would be injured. because the assignee ought to have taken care that the rent had been from time to time duly paid, and the premises kept in repair, inasmuch as he took the property subject to those conditions. If he has been guilty of negligence with reference to those conditions, and the plaintiffs have been damnified by that negligence, why are the plaintiffs not to maintain an action? Is there not a duty implied from the nature of the contract, and the relation that existed between the parties, from the defendant to the plaintiffs in that respect? I think there is, and it seems to me that that duty has been very accurately stated in the declaration, where it is described as co-extensive with the particular period during which the defendant, as assignee of the premises, held and enjoyed. I need not go through the cases in which it has been decided, that although there has been an express contract, the party is not bound to resort to the express contract and make it the gist of the action; but it is quite clear, that he may declare on the tort, and recover for the injury arising from the neglect to perform the duty, which the express contract had imposed. One of those cases I will, however, advert to, namely, Dickson v. Clifton (a). In that case the plaintiff declared, that he had retained and employed the defendant in his service, to be master and commander of a vessel to receive on board at a certain place a particular cargo of corn, and carry the same to a given place, and deliver it to a particular person. There is no doubt that assumpsit might have been maintained against the captain for his negligence in not carrying the cargo, or for not taking care of it after he had received it on board. But there, instead of bringing assumpsit on the contract, the plaintiff brought case for negligence in the performance of the contract, the terms of which were specially set out. Upon what principle was that action maintain-

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able? It could only be that the express contract created a duty, and for the breach of that duty, an action of tort might be maintained. The decision in Bretherton v. Wood (a), Judin v. Samuel (b), and several other cases are all founded on the same ground. This is not an action upon the case, in the nature of waste, but it is brought to recover a compensation in damages, because the defendant has not performed that duty which, as between him and the plaintiffs, he was bound to perform, and I think that, considering the relation of these parties, there can be no doubt that the plaintiffs are entitled to maintain an action for a compensation in damages, by reason of the defendant's breach of duty.

HOLROYD, J.—I am also of opinion that there ought to be no new trial, and that the judgment ought not to be It seems to me that the lease was properly received in evidence, without proof of execution by the subscribing witness, coming as it did out of the hands of the defendant, or of a person who claimed under him. The other point lies in a very narrow compass. plaintiffs, as representatives of the testator, were subject to the payment of the rent, and to the performance of the covenants contained in the lease. The declaration states that the defendant knew of those circumstances. plaintiffs assigned the lease to the defendant, subject to the payment of the rent, and the performance of the covenants, and he entered into possession under that assignment. The effect of that was, to take away the tenancy from the original lessee, and to vest it in him as assignee, and to take it completely from the original lessee. Unless there had been an express covenant, the original lessor could not sue the original lessee, for any breach of the covenants committed subsequent to that period of time, for it is only by reason of his tenancy that he remains liable to the lessor. What is the effect of the assignment? The assignee, by virtue of it, stands in the

<sup>(</sup>a) 6 J. B. Moore, 141; 3 B. & B. 54.

<sup>(</sup>b) 1 N. R. 43.

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same situation as the original lessee; he takes it subject to the payment of the rent, and the performance of the covenants. Is he not then bound, so long as he is the assignee, to perform them, not merely by a moral, but by a legal obligation, created by the common law, under the circumstances stated in the declaration? He had the benefit of the estate, and then upon the maxim qui commodum sentit onus et sentire debet, he is liable to all the duties which such a situation imposes on him. It appears to me. therefore, that where a person has a particular duty imposed upon him by operation of law, and he neglects that duty, he is liable to an action on the case, and that such an action is the proper remedy. I think that under the circumstances of this case, an action of covenant would not lie, but even if it would, that would not prevent the plaintiffs from bringing an action on the case. If neither case nor covenant is maintainable, I do not see what remedy the plaintiffs would have for those breaches of covenant committed after they had assigned to the defendant, and for which they had been made liable in damages by the original lessor. If they had no remedy, the consequence would be that the defendant would enjoy all the benefit of the estate, without any obligation either to pay rent, or perform the covenants. It would be extremely unjust if such a construction could be put upon this transaction: but it appears to me that we are justified upon the principles of the common law, in deciding that the defendant is liable in this form of action.

LITTLEDALE, J.—I am of the same opinion. Upon the first question, I think'there was sufficient evidence given of the execution of the lease, without going any further. The second question is, whether an action is maintainable at all, under the circumstances of this case, and if it is, then whether this is the proper form of action? Now as to the question, whether any action is maintainable at all, under the circumstances stated in the

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declaration, by the original lessee against the assignee, I confess I, for one, had for some time considerable doubt. There is no instance of such an action that I can find in any of the books, nor do I recollect having heard of a declaration in this form. It does appear at first sight, that there is not that kind of privity between the lessee and the assignee, which would entitle the former to maintain any action whatever, because he appears to have parted with the whole of his interest in the lease. The practice in the profession, certainly, is for the lessee to take from the assignee a bond or covenant to indemnify, and not merely to assign by a deed-poll as in the present instance. Upon principle, however, I think that an action on the case may be maintained by a lessee against his assignee. If there were not some remedy of that kind in a case where no bond or covenant has been taken, the consequence would be, that the lessee would be left without any protection whatever, and he would have to pay the rent during the whole of the term, and be answerable for breaches of covenant, although the assignee had the beneficial occupation, and had himself committed the breaches of covenant. There is, therefore, very good reason why an action of that kind should be maintained. But it is said, that if any action lies at all, it ought to be an action in covenant. I, however, see no pretence for saying that such an action could be maintained. The assignment here was merely by deed-poll, executed by the assignor, but not by the assignee. An action of covenant, it is true, will lie by the lessee against the lessor, on the demise in the original lease; but this is because the law gives a technical effect to the word demise; but by the mere assignment there is no technical effect given, because the word assignment does not amount to any covenant or contract on the part of the assignee to pay the rent, or perform the covenants in the original lease; and, therefore, in order to enable the assignor to maintain covenant against the assignce, there

must be a contract, under seal, by the assignee. Then, if an action of covenant will not lie, let us consider whether assumpsit would be a proper remedy under the circumstances of this case. The action of assumpsit is founded upon a promise, either express or implied; and where it is express, that form is the most suitable for adoption; but where, as in this instance, the promise is implied, from a peculiar state of circumstances raising a duty, and the duty is violated, then it appears to me, that although assumpsit on promises would lie, yet the more proper remedy would be an action on the case for a tort. It is for this reason that I think case is better adapted to the plaintiffs' injury than assumpsit, especially in the absence of any express contract between the parties to this record. The ground of action here is, the damage resulting to the plaintiffs from the defendant's breach of duty. The mere neglect of duty would not afford the plaintiffs any ground to recover in assumpsit against the defendant, as upon a The duty was not to be performed to the plaintiffs, but to the original landlord; but the defendant's interest is wholly derived from the plaintiffs, and it is in consequence of the defendant's neglect of duty that the plaintiffs have been damnified, by the original landlord coming upon them for the breach of those covenants contained in the lease, after the assignment to the defendant. The plaintiffs having thus sustained a damage, it appears to me that they may, in this form of action, recover a compensation for the injury they have suffered, by reason of the breach of the defendant's implied duty to perform the covenants in the original lease.

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Rule discharged.

Friday, 2nd June.

A paving act empowered commissioners to sue in the name of their clerk, for any sums due from certain persons therein named, or any other person or persons, payable by virtue of that act; and enacted. that if any treasurer, collector, officer, or other person, appointed by the commissioners to collect money, should become bankrupt with money of the commissioners in his hands, his assignees should pay the money in full, in preference to all other debts, except debts to the King: -Held, that the commissioners might sue in the name of their clerk, the assignees of their banker, to recover the money in his hands at the time of his bankruptcy; banker.

FROST v. BOLLAND and others, Assignees of MARSH and others, Bankrupts.

Plea, nil debet, and issue thereon. At the trial, before Abbott, C. J., at the adjourned Middlesex sittings after last Trinity term, the plaintiff had a verdict, damages 1,070l. 12s., subject to the opinion of the Court upon the following case.

The local and public act, 12 Geo. 3, c. 69, appoints commissioners for paying, or otherwise improving, certain streets and other public passages and places in the parish of St. Pancras, Middlesex. The plaintiff was clerk to the commissioners appointed to carry that act into execution. The defendants were assignees of Messrs. Marsh, Stracey, Fauntleroy and Graham, bankrupts under separate commissions. The action was brought to recover the sum of 1,0701. 12s., received by the bankrupts to the use of the defendants. The fourth section of the 12 Geo. 3, c. 69, enacts, "That it shall and may be lawful to and for the said commissioners, [the previous section nominating the commissioners at the time of passing the act, and directing the appointment of commissioners in future], or any seven or more of them, at any meeting to be held in pursuance of that act, to appoint one or more treasurer or treasurers, clerk or clerks, collector or collectors, surveyor or surveyors, with such allowances as they shall judge reasonable, and may also from time to time appoint such other officer or officers as they shall find necessary and convenient, and shall or may take security from all such persons for the due execution of their respective offices, and may from time to time remove all or any of the said amount of their officer or officers, or other person or persons, and appoint others in the room of such of them as shall be so removed." The seventy-sixth section enacts, "That the collector or though he had received from the commissioners no written appointment as their

collectors of the rates and assessments aforesaid, shall pay the money as he or they shall receive the same, to the treasurer or treasurers for the time being to the said commissioners." The seventy-seventh section enacts, "That as soon as conveniently may be after the treasurer or treasurers of the said commissioners shall at any time have received the sum of 5001., of the monies appointed to be received by him or them, by virtue of and for the purposes of this act, he or they shall from time to time pay the same into the hands of such banker or bankers, as the said commissioners, or any seven or more of them, shall for that purpose direct, in the name and on the account of the said commissioners; and the same shall be disposed of by order of the said commissioners, or any seven or more of them, for the purposes of this act, and not otherwise." The seventy-ninth section enacts, "That four times at least in every year, an account, from the book or books to be kept by the collector or collectors, of the sum or sums of money as shall be so assessed, shall be fairly stated and signed by the collector or collectors, and delivered by him or them to the said commissioners, who are hereby empowered to give a discharge to the said collector or collectors for all such monies as he or they shall have truly accounted for; and in case any treasurer or treasurers, collector or collectors, officers, or other persons, shall happen to die or become bankrupts before he or they shall have fully paid and satisfied all the monies by him or them received by virtue of this act; then, and in every such case, the executors, administrators, or other legal representatives, person or persons, possessing the estate and effects of any such treasurer or treasurers, collector or collectors, officer or officers, or other person or persons, or the assignee or assignees of such bankrupt, shall out of such estate and effects pay unto the treasurer or treasurers for the time then being, to the said commissioners, all such sums of money as shall be in the hands of such persons respectively at the time of his or their death, or at the

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time of suing out any commission of bankrupt against him or them, and not paid over; or so much thereof as the said estate or effects will extend to pay, &c.; and in case of non-payment of the same by the space of ten days after the same shall have been demanded, it shall and may be lawful to and for the treasurer or treasurers for the time being to such commissioners, and he and they is and are hereby directed and required, in his or their own name or names, to commence one or more action or actions in any of his Majesty's Courts of Record at Westminster, against such executors, administrators, assignee or assignees, or other persons as aforesaid, for the recovery of the same." The forty-seventh section of the general Metropolis Paving Act, 57 Geo. 3, c. 29, enacts, "That the commissioners, or trustees, or other persons having the control of the pavements of any parochial or other district within the jurisdiction of that act, may at any meeting or meetings appoint a clerk or clerks, and may appoint one or more collector or collectors of the rates and assessments, and an inspector or inspectors of the pavements within their parochial or other districts, and such other officer or officers for the execution of this act, or of the local act or acts of parliament relating to the paving of such parochial or other districts exclusively, or jointly with any other matters or objects as such commissioners, trustees, or other persons, shall think proper; and may from time to time remove them, or any of them, and appoint other persons in his or their stead, as they shall think it necessary or convenient." The fifty-first section enacts, "That in case any treasurer, collector, officer, or other person, appointed by the commissioners, or trustees, or other persons having the control of the pavements of the streets and public places in any parochial or other district within the jurisdiction of this act, for the collection and receipt of the monies to be collected and received by virtue of any rates and assessments which may be made for or towards the expenses of paving and keeping in repair the pavements of any streets and

public places within such parochial or other district, either exclusively, or jointly with, or for, or towards any other objects or purposes, shall happen to die or become bankrupt, before he or they shall have fully paid and satisfied all monies received by him, or them, for, or in respect of any such rates or assessments; or for, or on account of the commissioners, or trustees, or other persons, by whom he or they, shall have been appointed; then, and in every such case, if such treasurer, collector, officer, or other person, shall die, the executors, administrators, representatives, or other persons, possessing the estate and effects of every such treasurer, collector, officer, or other person, appointed by the said commissioners, or trustees, or other persons, having the control of the pavements of the streets and public places within such parochial or other district; or, if he shall become bankrupt, then the assignee or assignees of the estate and effects of such bankrupt, shall, out of such estate and effects, pay to the said commissioners, or trustees, or other persons, having the control of the pavements of the streets and public places within such parochial or other district as aforesaid, or to such person or persons as they shall from time to time direct to receive the same, all such sum and sums of money as shall have been collected or received by such treasurer, collector, officer, or other person, appointed by the said commissioners or trustees, or other persons as aforesaid; and which shall be due and owing from him to the said commissioners, or trustees, or other persons as aforesaid, by whom he, or they shall have been so appointed, at the time of his death, or at the time of the suing out any commission of bankrupt against him, and not paid over, or so much thereof as the said estate and effects of such treasurer, collector, officer, or other persons, appointed by the said commissioners, or trustees, or other persons, as aforesaid, who shall so die, or become bankrupt, will extend to pay, and in preference to any other debt, or debts, except debts due to the King's Majesty, &c. And in case of non-payFROST v.
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FROST v. BOLLAND. ment of all and every such sum and sums of money by any executor, administrator, assignee, or other person as aforesaid, for the space of ten days after the same shall have been demanded by, or on the behalf of the said commissioners or trustees, or other persons by whom such treasurer, collector, officer, or other person, dying or becoming bankrupt, had been appointed, it shall and may be lawful to and for the said commissioners, or trustees, or other persons, having the control of the pavements within such parochial or other district, by whom any such treasurer, collector, officer, or other person, had been appointed, to commence one or more action or actions in any of his Majesty's Courts of Record at Westminster, against such executor, or administrator, assignee, or other person, as aforesaid, for the recovery of the same sum or sums of The hundred and twentieth section enacts, "That the said commissioners or trustees, or other persons having the control of the pavements in any streets or public places, in any parochial or other district within the jurisdiction of this act, may sue and be sued in the name of their respective clerks for the time being; and that all actions or suits that the said commissioners or trustees, or other persons having the control of the pavements in any streets or public places, in any such parochial or other district, may at any time or times hereafter direct to be brought for the recovery of any penalty or rates, or any other sum or sums of money, from time to time, or at any time due or payable, from or by any water or gas companies, or commissioners of sewers, or any other person or persons, due or payable by virtue of any local act or acts of parliament, relating to their respective parochial or other district, or of this act, or for or in respect of any other matter or thing relating to such local act or acts of parliament, or to this act, may be brought in the name of such clerk or clerks respectively, for the time being, in any of his Majesty's Courts of Record at Westminster, by action of debt," &c. The hundred and thirty-eighth

section enacts, "That neither any act or acts of parliament, relating either exclusively to the paving or repairing the pavement of the streets or public places in any parochial or other districts within the jurisdiction of this act, or relating thereto jointly with any other object or purpose, nor any clause, matter, or provision, therein contained, shall be hereby repealed."

On the 1st of July, 1819, the office of treasurer to the said commissioners became vacant by the death of John Jones, Esq., after whose death no treasurer was appointed by the said commissioners; and on the 8th of July, 1819, Messrs. Marsh, Sibbald, Stracey, Fauntleroy, and Graham, the persons then composing the firm of Marsh and Company, were appointed bankers to the said commissioners, by an appointment which was and is as follows:-" Resolved, that Messrs. Marsh, Sibbald, Stracey, Fauntleroy, and Graham, of No. 6, Berners Street, be appointed bankers to this commission, and that the collector do weekly pay into their hands, on the account of this board, all monies accruing to the commissioners;" signed, "John Frost, clerk to the commissioners." This entry appears in the book of the proceedings of the commissioners, and the appointment was made at a meeting at which fourteen commissioners were present. about September, 1819, Sir James Sibbald, a partner in the said firm, died, and after his death the business was continued by the other partners. The said commissioners under the said local paving act, and as such commissioners, after the death of Sir James Sibbald, continued to employ the said Messrs. Marsh, Stracey, Fauntleroy, and Graham, but without any new appointment, as the bankers of the said commissioners, and in the course of such employment, the said Messrs. Marsh, Stracey, Fauntleroy, and Graham, before the 16th of September, 1824, received monies of and belonging to the said commissioners, amounting to the sum of 1,0701. 12s., for the use of the said comFROST v.
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missioners, being monies collected and received by the collectors of the said commissioners, in virtue of the rates and assessments made under and by virtue of the said first mentioned act. On the 16th of September, 1824, the said Messrs. Marsh, Stracey, Fauntleroy, and Graham, being respectively traders, and subject to the bankrupt laws, and having committed acts of bankruptcy, a valid commission of bankrupt was issued against them on a sufficient petitioning creditor's debt, and they were duly declared bankrupts, and the said defendants were duly chosen and appointed, and became their assignees as such bankrupts; and on the 29th of October, 1824, a separate commission was issued against the said Fauntleroy, and he was duly declared a bankrupt, and the said defendants were duly appointed his assignees on the 7th of November. 1824. At the times when the said Messrs. Marsh, Stracey. Graham, and the said Fauntleroy, respectively became bankrupts, they were indebted to the said commissioners in the said sum of 1,070l. 12s. The said defendants, as assignees of the said Messrs. Marsh, Stracey, Fauntleroy and Graham, jointly as well as separately, have received and were possessed of, from, and out of the joint estate, and also out of the respective estates of the said Messrs. Marsh, Stracey, Fauntleroy, and Graham, more money than will be sufficient to pay and satisfy to the said commissioners and the said plaintiff, the said sum of 1,0701. 12s. On the 25th of January, 1825, the said commissioners, by their then and present clerk, the said plaintiff, did duly in writing demand by and on the behalf of the said commissioners, of and from the said defendants. so being such assignees as aforesaid, the payment of the said sum of 1,0701. 12s., and after ten days had expired from the time of such demand, this action was commenced by the said plaintiff, who was then, and still is, the clerk of the said commissioners by them duly appointed, in his name, by the express directions and authority of the said commissioners.

Chitty, for the plaintiff. Upon the trial of this cause, it was contended that the plaintiff could not recover, upon three grounds: - First, that he was not the proper plaintiff, and not entitled to sue; second, that the debt was not recoverable at all, bankers not being within s. 79, of the 12 Geo. 3, c. 69, or s. 51 of the 57 Geo. 3, c. 29; and third, that the bankrupts were never duly appointed the bankers to the commissioners. There is no weight in any of these objections. As to the first, s. 120 of the 57 Geo. 3, c. 29, expressly empowers the commissioners to sue in the name of their clerk for certain debts which it specifies; and as it contains no words limiting that power to those specific debts, or providing any other mode of suing for other debts, it must be taken to have a general application, and to extend to all debts owing to the commissioners. As to the second, the words or other persons, in s. 79 of the 12 Geo. 3, c. 69, and s. 51 of the 57 Geo. 3, c. 29, are clearly sufficient to comprehend bankers, and to extend the priority of claim given to the commissioners to a debt arising from the insolvency of a banker. As to the third, the act of parliament does not provide that the appointment of a banker to the commissioners shall be in writing, and therefore the employment of the bankrupts as bankers, and their receipt of the money in that character are sufficient, and render the defendants, as their assignees, liable. Should the Court deem the construction of the statute doubtful upon either of these points, they will bear in mind that the object of it was to protect the public, and will give it such a liberal and equitable construction as will tend to the effectuating that object.

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Bolland, contrà. First, the plaintiff, as clerk to the commissioners, has no power to sue in this case. Section 120, of the general act, does certainly empower the commissioners to sue in the name of their clerk in particular specified cases; but this is not one of the cases there specified: and the very enumeration shews that no other

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cases were intended to be included. Then s. 79 of the local act, which is unrepealed by the general act, provides, that if any treasurer, collector, officer, &c., shall die or become bankrupt, with money belonging to the commissioners in his hands, which is the very case before the court, if this case is within the statutes at all, the treasurer shall sue in his own name for the recovery of such money: and though it does not provide for the case of a default by the treasurer, or the non-existence of a treasurer, still it is quite clear that the commissioners in such cases would be entitled, and were intended to sue in their own names. At all events, it follows that the clerk is not the proper person to sue in this case. Second, bankers are not comprehended by the words or other persons, in the respective clauses of the statutes which give the priority of claim. The parties mentioned are "treasurers, collectors, and officers;" and the words, "other persons," following them, can only mean others ejusdem generis with those preceding, which bankers cannot with any justice be considered to be. Third, the firm of which the bankrupts were members, were appointed bankers to the commissioners by an appointment in writing; and when Sir James Sibbald died, no new appointment was made, but the bankrupts went on to act without any appointment. Now that is clearly bad, for the death of one of the partners put an end to the contract between the partnership and the commissioners, and without a new appointment, therefore, the bankrupts cannot be said to have been the bankers to the commissioners. this principle, Weston v. Barton (a), is a direct authority.

ABBOTT, C. J.—I think the power given to the commissioners by the 57 Geo. 3, c. 29, s. 120, to sue in the name of their clerk, is not confined to the instances enumerated in that clause, but extends to the present case. I agree that the words other persons, in the sections giving

(a) 4 Taunt. 673.

priority of claim, must mean others ejusdem generis, with those previously mentioned; but I think the bankers, under all the circumstances of this case, there being no other treasurer, and they in effect, though not in name, being the treasurers, are ejusdem generis with treasurers, and within the provision of the statutes. The local act does not require that the appointment of the bankers shall be in writing, therefore I think no new written appointment was necessary after the death of Sir James Sibbald, but that the employment of the bankrupts as bankers, and their receipt of the commissioners' money in that capacity, are equivalent to an appointment, and sufficient to render the defendants, as their assignees, liable for the whole sum claimed by this action.

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The rest of the Court concurred.

Judgment for the Plaintiff.

## The KING v. M'KAY.

QUO WARRANTO against the defendant, for usurping the office of bailiff of the borough of Stockbridge, in the county of Hants. Judgment for the crown. The rated borough Master of the Crown office having taxed the relator his bers to parliacosts, under the statute 9 Anne, c. 20, a rule was obtained, calling on the relator to shew cause why the Master within the should not review his taxation, on the ground, that Stock- operation of bridge not being a town corporate, it did not come in the event of within the operation of the statute. Stockbridge is a judgment aborough by prescription, sending two members to parlia- a quo warment, but it is not a corporate town. The bailiff is the tion. returning officer; and the question was, whether the

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The returning officer in an unincorposending memment, is not liable to costs 9 Anne, c. 20, gainst him on ranto informaCASES IN THE KING'S BENCH,

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relator, having succeeded in the quo warranto information, was entitled to his costs by operation of the statute 9 Anne, c. 20.

In Easter term, Adam and Carter shewed cause against the rule, contending that the relator was entitled to his costs. Merewether was heard contrà. The cases cited upon the construction of the act, are referred to in the judgment of the Court.

Cur'. adv. vult.

The judgment of the Court was this day delivered by

BAYLEY, J.—The question in this case was, whether in an unincorporated borough, sending members to parliament, the returning officer, the bailiff, was within the statute 9 Anne, c. 20. Upon the argument, several cases were cited upon the construction of that act, and the case stood over, that those authorities might be referred to and considered. There had been a quo warranto information against the defendant, upon which the Master of the Crown office had allowed costs, and the point was, whether costs were allowable or not. This depended wholly on the statute 9 Anne, c. 20. That statute imports by its title, to have passed to render the proceedings upon writs of mandamus and informations in the nature of a quo warranto, more speedy and effectual, and for the more easy trying and determining the rights of offices and franchises in corporations and boroughs. The act recites, that divers persons had intruded themselves into the offices of mayors. bailiffs, portreeves, and other offices within cities and towns corporate, boroughs, and places in England and Wales, and that where those offices are annual, it is difficult to bring the right to trial within a year, and where they are not annual, it is difficult to do so before they have done divers acts in their offices prejudicial to the peace.

order and good government, within such cities, towns corporate, boroughs, and places. It also recites that divers persons who had right to such offices, or to be burgesses or freemen of such cities, have illegally been removed, or refused admittance, having no other remedy to procure admittance or restoration to their said offices, or franchises, of being burgesses or freemen, than by writs of mandamus, the proceedings on which are dilatory and expensive, and then it provides, for speedy obedience to such writs, for proceedings upon the returns thereto, and for damages and costs thereon. It then provides for quo warranto informations, in respect of any of the said offices or franchises. It directs the mode of proceeding thereon, and provides for costs, for or against the relator, and directs that the statute 4 Anne, c. 16, and all the statutes allowing double pleas, &c., shall extend to the proceedings on such writs of mandamus and quo warranto information, The statute then recites a distinct and independent mischief, namely, the re-electing for successive years in divers counties, boroughs, towns corporate, and cinque ports, the mayor, bailiff, or other officer, to whom it belongs to preside at the election, and make the return of members to serve in parliament, where such officer is annually elected, and enacts and declares, that no person who hath been in such office for one whole year shall

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be capable of being chosen for the year ensuing. Upon this statute the question is, whether those parts of it which relate to writs of mandamus and quo warranto informations extend to boroughs which are not corporations, and in which the officer or officers that exist have nothing to do with the government of the place, or whether they are confined to corporate places and corporate officers. The first case in which this question appears to have been mentioned, as far as I have been able to find, is Rex v. Boyles (a), where, upon a quo warranto informa-

tion to shew by what authority the defendant claimed to
(a) Fitzg. 82. 2 Ld. Raym. 1559. Stra. 836.

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be one of the bailiffs of Southwold, which was described as an office of trust and pre-eminence, and touching the rule and government, and the administration of justice within the said vill, it was urged for the defendant, that the statute of Anne was declaratory in what cases a quo warranto lay, and that this office, as described, was not within the preamble of that act. The Court did not, as is supposed, arguendo in Rex v. Wallis (a), decide that the office was within the statute, but denied that the statute was exclusive of cases not recited in the preamble of the act, meaning probably, that quo warranto informations would lie in other cases than those to which the act refers. The first important case is Rex v. Williams (b). question there was not upon any distinction between corporations and boroughs which were not corporations, but upon a distinction in a corporation, between usurping a corporate office, and exercising non-corporate rights. The information there was to shew by what authority the defendant held a court of record within the borough of Denbigh. The judgment was for the crown, and costs were awarded, under the statute, and the question was, whether the award of costs could be supported. There was no doubt but that the place, Denbigh, was a town corporate, but the defendant had not usurped the corporate office; he had merely exercised a non-corporate right. Lord Mansfield was of opinion that the act was meant to extend to all officers of corporations, as such, but it was not within its principle or meaning, that it should extend to all offices exercised within the limits of the cor-He said that the title could not control the body of the act; and there being no charge of usurping any office, the judgment as to the costs was wrong. nison, J., said, that "franchises," in the act, meant corporate rights, or rights to freedom in corporations; and Foster, J., said, it meant freedoms, and rights to be members of the corporation. This case, therefore, though it

<sup>(</sup>a) 5 T. R. 375.

decides nothing expressly, as to the distinction between boroughs and corporations, contains dicta, that the act refers only to corporate rights; and if it be confined in corporations to corporate offices, it cannot extend to noncorporate offices in unincorporated towns and places. Rex v. Marsden (a), Yates, J., says, "the statute 9 Anne. extends only to corporation offices." In Rex y. Wallis (b) the question was, whether the statute applied to a quo warranto information against the defendants for usurping the office of constable of Birmingham. Birmingham is not a corporation, or a borough, but it is a place, and the 9 Anne, c. 20, has the word place, as well as towns corperate and boroughs. There was a judgment for the crown, and costs were allowed to the prosecutor, and the question was, whether such allowance of costs was right. and the Court held that it was not, because the word "places" in the 9 Anne, c. 20, applied only to such places as were ejusdem generis with those enumerated in the statute, "cities, towns corporate, and boroughs;" for had all places been intended, the legislature would have used one compendious word to comprehend all places; and Buller, J., noticed the distinction between burthensome offices, such as that of a constable, and such from which profit may be expected, as corporate offices in corporations. He also noticed the expression of Lord Mansfield, in Rex v. Williams, that it is not within the reason or meaning of the act, that it should extend generally to all offices within a corporation, and drew the inference, that Lord Mansfield must have thought there was no office not in a corporation within the act. In Rex v. Hall (c), the same question occurred as in Rex v. Williams, whether the statute applied to a non-corporate office, the office of register, and clerk of the court of requests, in a corporate place [the city of Bristol]; and Abbott, C. J., referred to Rex v. Wallis, as deciding that the

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<sup>(</sup>a) 3 Burr. 1812.

<sup>(</sup>c) Ante, vol. ii., 341. 1 B. &

<sup>(</sup>b) 5 T. R. 375.

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word "places" meant places ejusdem generis with those mentioned in the act, and that Birmingham not being a city, or town corporate, was not a place, within the act; and added, as his own opinion, that "other offices" must mean offices ejusdem generis with those mentioned, which are all corporate offices. In Rex v. Richardson (a), upon a quo warranto information against the portreeve of the borough of Penryn, which is not a corporate borough, the defendant obtained a rule nisi to plead several matters, and contended that he had a right to do so, because the borough returned members to parliament, and was therefore within the statute of Anne, which gives a right to plead double, in cases within that act; but, upon cause being shewn, the Court considered Rex v. Wallis as in point; that the statute only applied to corporate offices; and therefore discharged the rule. Upon this particular point, the only case I am aware of, upon which a doubt arose, was Rex v. Highmore (b). The question there was, whether, on a quo warranto information against the bailiff or sub-bailiff, who is the returning officer of Milburn Port, which is a borough sending members to parliament, but not a corporation, the defendant was entitled to plead double. During the argument, Abbott, C. J., said the words "burgesses or freemen," seem to confine the statute to places having burgesses or freemen; but the rule to plead several matters was made absolute, for if the Court discharged the rule the defendant would have been precluded from setting the matter right by writ of error, whereas, if they made it absolute, and the defendant pleaded double, the error, if it were one, would be on the record, and the judgment of a higher tribunal might be obtained. That case, therefore, proceeded not so much upon the ground that the Court had doubt, as upon the principle that the question, if any, should be open to investigation by a court of error. Upon this state of the authorities, where there is not one that expresses

<sup>(</sup>a) 9 East, 469.

<sup>(</sup>b) 5 B. & A. 771. Ante, vol. i., 438.

any doubt, where one, Rex v. Richardson, which is expressly in point, and where all the others, except Rex v. Highmore, which is no authority either way, proceed avowedly upon the principle, that the statute applies only to corporate offices (that is, offices in a corporation), the error in those decisions must be very palpable, and the words of the statute very plain and unequivocal, before we can act in opposition to the principle upon which those decisions proceed. But when we consider that the word "boroughs," in the title to the act, may be satisfied by referring it to the last section, which prohibits the choice of a returning officer for two successive years, and that in that preamble which introduces the provisions for writs of mandamus, and quo warranto informations, we find mention made of the peace, order, and government of the place, with which a bailiff, merely as returning officer, has nothing to do, and of burgesses, or freemen, which occur only in corporations, we think it is impossible to say that it is clear that the provisions as to writs of mandamus, and quo warranto informations, apply to unincorporated boroughs; and, on the contrary it appears to us, that they apply wholly to corporate offices in corporate places. The consequence is, that the rule nisi obtained in this case must be made absolute.

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Rule absolute.

DOE on the demise of Evans v. Evans.

THIS was an ejectment to recover the possession of certain copyhold estates in Somersetshire. Plea, not guilty, holder, join tenant, was and issue thereon. At the trial before Gazelee, J., at the capitally con-

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ny and pardoned upon condition of suffering two years' imprisonment. The lord took no steps towards seizing the land. After the two years' imprisonment had expired, the copyholder brought ejectment against his joint tenant, who had ousted him:—Held, that the lord having taken no step towards seizing the land, it did not vest in him; and that the copyholder, being restored to his civil rights by the pardon, might maintain the action. DOE v. EVANS.

last Somersetshire summer assizes, the case was this:-The estates were held of the manor of the vicarage of Chew Magna and Dundry, in the county of Somerset. It appeared by the copy of the court roll, dated 26th November, 1783, that F. King, and J. Evans, the father of the lessor of the plaintiff, surrendered the estates, and took a new grant, first to F. King for life, and then to J. Evans for life; and after the death of the latter, to his widow, Jane, and their sons, J. Evans and T. Evans, the lessor of the plaintiff and the defendant, as joint tenants, for their lives, and the life of the survivor. F. King died in 1807; J. Evans, the father, in 1818; Jane Evans was still living. J. Evans, the lessor of the plaintiff, was convicted of felony in 1808, and sentenced to seven years' transportation; and in 1814 he was convicted of a capital offence, in being at large in England before the period of his transportation had expired: and was attainted, but received a pardon under the sign manual, on condition of suffering two years' imprisonment. The day of the demise was subsequent to those two years. Ouster was admitted. It was contended, on the part of the defendant, that the lessor of the plaintiff could not recover, for that his attainder was a civil incapacity, and disabled him from making a demise. The learned Judge reserved the point, and the plaintiff obtained a verdict, with liberty to the defendant to move to enter a nonsuit. In Michaelmas term last a rule nisi was obtained accordingly, against which

Merewether and Erskine now shewed cause. The question is, whether the conviction of the lessor of the plaintist did not operate in law as a severance of the joint tenancy. It is submitted that it did. The forfeiture of copyhold lands is to the lord, not to the king; 1 Watkins, 341; Kean v. Kerly (a), Margaret Podger's case (b); and relates back to the time when the offence was committed;

<sup>(</sup>a) 1 Mod. 200.

<sup>(</sup>b) 9 Rep. 107.

Co. Litt. 390 b; Com. Dig. Forfeiture (B. 6): therefore the joint tenancy was severed when the offence was committed. The attainder was subsequent; therefore the defendant could not claim the estates by survivorship, because the joint tenancy was severed before the civil death of the lessor of the plaintiff took place. Then the joint tenancy having been severed, the lord was at liberty to enter and seize, if he chose; as he did not, the estate still continued in the parties: Rex v. Haddenham (a). The lord waived the forfeiture, and renounced all claim against the lessor of the plaintiff; the defendant, therefore, had no right to claim the estate as against the lessor of the plaintiff. Benison v. Strode (b), will probably be relied on for the other side; but the decision there proceeded on a totally different ground, and wholly inapplicable to the present case; for there the question arose between the copyholder for life, and him in remainder, to whom the copyhold lands had been granted, after the death, surrender, forfeiture, or other determination of the first estate: and there, the lord could not enter, inasmuch as he had granted the reversion over. Then it is clear, that the disability worked by the attainder was removed by the pardon. The 6 Geo. 4, c. 25, s. 1, enacts, "that in all cases in which his late Majesty, or the King's Majesty that now is, his heirs or successors, hath been, or shall be pleased to extend his or their royal mercy to any offender convicted of any felony, whereby the offender was, is, or shall be, excluded from the benefit of clergy, and by warrant under his or their sign manual, countersigned by one of his or their principal secretaries of state, hath granted, or shall grant to such offender, either a free pardon, or a pardon upon condition of transportation, imprisonment, or any other punishment; the discharge of such offender out of custody in case of a free pardon, and the performance of the condition, in case of a conditional pardon,

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<sup>(</sup>a) 15 East, 463. 3 Levinz, 94. 2 Shower, 150.

<sup>(</sup>b) T. Jones, 189. Pollex. 617. Skimner, 8, 29. Moor, 238.

Doe v. Evans. shall have the effect of a pardon under the great seal, for such offender, as to the felony whereof he or she was so convicted." Now the lessor of the plaintiff was discharged out of custody, having performed the condition of his pardon, long before the date of the demise; therefore, the pardon operated back from the time of his discharge, and his disability was removed before the demise was made.

W. E. Taunton, contrà. The lessor of the plaintiff is civilly incapacitated from making a demise, and that is sufficient to defeat the present action, without contending that the defendant is entitled to the estate by survivorship. Rex v. Haddenham(a), is a different case from this. That was a question of settlement; there the lord had granted to the pauper, subsequently to the attainder and pardon: and it was held that he was estopped by the grant. An attainted felon cannot hold land; Co. Litt. 2 b; à fortiori, therefore he cannot demise it. Large and comprehensive as are the words of the 6 Geo. 4, c. 25, s. 1, the pardon in this case cannot restore the lessor of the plaintiff's capacity; for his interest vested in the lord from the time of the attainder, and the pardon could not devest it from the lord, and revest it in the felon. . Com. Dig., Pardon, (F). That was so held in Benison v. Strode, as appears from some reports of that case (b). [Abbett, C. J., It does not appear that the lord entered in this Nor need it; Benison v. Strode decided, that entry was not necessary in order to vest the estate. In one report of that case, the Court are represented to have said, that he in remainder shall enter (c)]. could only mean that he might enter, that he was entitled to the land.

ABBOTT, C. J .-- It is quite clear that the pardon by

<sup>(</sup>a) 15 East, 463.

<sup>(</sup>c) Skinner, 29.

<sup>(</sup>b) T. Jones, 190. 2 Shower, 150.

virtue of the statute 6 Geo. 4, c. 25, s. 1, restored to the lessor of the plaintiff his civil capacity to hold lands; but it has been urged, and correctly, that it could not devest an interest which had in the interval vested in another. That argument raises another question, namely, whether the lessor of the plaintiff's interest vested in the lord instanter upon the attainder, or whether after the forfeiture it was necessary that some act should be done by the lord, by office found, or presentment made, or entry and seizure, or by some step or other, before the estate would vest in him? As at present advised, we all concur in the opinion that the estate would not vest in the lord, without some such step being taken by him; but if, upon further consideration, we should see reason to change that opinion, we will mention the case again.

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Rule discharged, Nisi.

The case has not since been mentioned.

STUDDY V. SAUNDERS and another.

Friday,

Plaintiff having a quan-

tity of apples,

ASSUMPSIT upon a special agreement. Plea, non assumpsit, and issue thereon. At the trial before Bur-

by contract in

writing, agreed with defendant to sell him his cider at 35s. per hogshead, to be delivered at T. at a future time, and to lend what casks he had empty for the cider, to be manufactured on plaintiff's premises, to be paid for before it was taken away. Plaintiff pounded his apples, and delivered the juice to defendant's servant, who proceeded to manufacture the cider. Before the manufacture was complete, the cider and the casks, some of which belonged to the plaintiff, were seized by the excise officers, for being in an unentered place, and condemned in the Exchequer as defendant's property. In an unentered piace, and condemned in the Exchequer as defendant's property. In Deposable, where the parties lived, cider means the juice as expressed from the apples. In assumpsit for the price of the cider and the casks:—Held, that the contract was for the sale of juice, not manufactured cider; that the delivery of the juice to defendant's servant, vested the property in defendant; that it was defendant's duty to have entered the premises; that his neglecting to do so rendered plaintiff's delivering the cider at T. impossible, and therefore unnecessary; and that plaintiff, therefore, was entitled to recover the price, both of the cider, and of the casks. STUDDY
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rough, J., at the Devonshire summer assizes, 1823, the plaintiff obtained a verdict, damages 508l. 16s., subject to the opinion of the Court upon the following case.

In the year 1819, the plaintiff was possessed of a considerable quantity of apples, the growth of his own land, cultivated by himself; and on the 29th of October, 1819, he entered into the following contract with the defendants, who were cider merchants, carrying on business at Bristol. "It is agreed, on this 29th of October, 1819, between Thomas B. Studdy (the plaintiff), and W. Saunders and Co. (the defendants), that the aforesaid Studdy has sold his cider at 35s. per hogshead, to be delivered at Totness, in the spring of the year 1820; and the cider or wine pipes, that he has empty, for the use of the said cider, to be manufactured in premises of his the said Studdy's; and for the lend of such casks, the aforesaid Saunders and Co. are to pay 1s. per hogshead, in addition to the aforesaid 35s., in all 36s. per hogshead; and the said 36s. per hogshead is to be paid, one moiety at Christmas next, and the other half before the cider, or any part, is taken from the said Studdy's. Signed, Thomas B. Stud-William Saunders and Co. N. B. The aforesaid Studdy is to put the said casks lent in good repair for working; and it is expected, that the cider will be from two to three hundred hogsheads; if more, Saunders and Co. agree to take it. And if Saunders and Co. want to take or draw off the premises, any of Studdy's casks, they are to pay 30s. per pipe for them." After the making of the above contract, the defendant Saunders, engaged one Hunt, at a salary of 11. per week, to manufacture the cider for the defendants, and gave him directions to apply for such articles as he might want to his, Saunders's brother, and to obtain what money he wanted from the plaintiff; and Hunt accordingly obtained from the plaintiff. sums of money to the amount of 121. The apples were afterwards pounded, and the juice expressed by the plaintiff's servants, and the juice, or cider, as it is called in

Devonshire, was, by the plaintiff's servants, then put into casks, partly belonging to the plaintiff, and partly provided by Saunders, and delivered to Hunt upon the plaintiff's premises, for the purpose of being manufactured there. Hunt was directed by Saunders to be particular in receiving the cider from the plaintiff's people, to see that he had the proper measure, and that the casks delivered to him were full. The whole process of manufacture was in the hands of Hunt, and of a person employed by him, by the defendant's directions; and Hunt procured brimstone casks, and other articles required, from the persons named by the defendant Saunders, and according to his direc-Saunders occasionally attended, and gave directions to Hunt about the manufacture of the cider, and nothing remained to be done by the plaintiff to the cider, after the delivery to Hunt, except what, if any thing, the contract required; but the plaintiff claimed to be entitled to prevent the removal from off his premises, until he should be paid the price. Hunt was on Studdy's premises, manufacturing the cider, for twelve weeks; when the same was seized as hereinafter mentioned, the racking was not finished, it was in different stages of its progress. tween the date of the contract, and the time of the seizure hereinafter mentioned, 221 hogsheads of cider had been expressed by the plaintiff's servants, and delivered to Hunt, and he had, during that interval, been employed in manufacturing the cider. After the delivery of the cider to Hunt, nothing remained to be done to it by the plaintiff, except as aforesaid; whatever was further required, was to be done by Hunt. Cider, in the course of manufacture, diminishes in quantity, after the average of six or eight gallons per hogshead.

By the statute 3 Geo. 3, c. 1, s. 25, it is enacted, "that any person who shall, after the 25th day of March, 1763, sell any quantity of cider, or perry, or either of them, in less quantity than 20 gallons at a time, whether the same be made from fruit of his own growth, or from bought

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fruit, shall be deemed and taken to be a dealer in cider and perry, and a retailer thereof, and shall be subject and liable to the duty of 4s. per hogshead for such quantity of cider and perry so sold, over and above all other duties payable for cider and perry sold by retail; and that every dealer in, and retailer of cider and perry, and other person receiving into his custody any quantity of cider and perry, or either of them, for sale, and every person who shall buy any fruit to make into cider or perry, or either of them for sale, shall make a true and particular entry in writing of the several and respective store-houses, rooms, cellars, vaults, and other place and places by him made use of, for the making and keeping of cider and perry, or either of them, at the office of excise, within the compass or limits whereof such respective store-houses, rooms, cellars, vaults, and other place or places shall be situated, on pain of forfeiting the sum of 501. for every such storehouse, room, cellar, vault, or other place, which, from and after the said 25th day of March, 1763, shall be made use of by any such dealer or retailer, receiver, or maker. respectively, without making such entry thereof as aforesaid."

By the statute 42 Geo. 3, c. 93, s. 17, it is enacted, "that in case any of the goods, wares, merchandize, or commodities, for or in respect whereof any duties or excise are imposed by any act or acts of parliament in force, immediately before the passing of this act, shall be fraudulently deposited, hid, or concealed, in any place or places whatsoever, with an intent to defraud his Majesty of any of the duties of excise, by any such act or acts of parliament imposed for or in respect thereof; all such goods, wares, merchandise, and commodities, respectively, shall be forfeited, together with the packages containing the same, and shall and may be seized by any officer or officers of excise."

The plaintiff's premises were not entered. Hunt never saw the plaintiff, before he applied to him respecting the

cider in question. At the time when the communication took place between Saunders and Hunt, Saunders told Hunt he had bought the plaintiff's cider, but that he, Hunt, might as well say to any body who enquired, that he Hunt, was the plaintiff's servant, as they, the defendants, did not wish it to be publicly known that they had bought the cider, as they had given a longish price for it. An secident took place during the manufactory of the cider; the floor gave way, and four or five hogsheads of the cider were lost, which are not included in the demand in this cause. On the 3rd of January, 1820, the officers of excise came to the plaintiff's premises, and informed the plaintiff that they had come to search for cider belonging to Saunders, a dealer, whereupon the cider in question, amounting to 221 hogsheads, was shewn to them, and they were informed by the plantiff, that such cider had been sold by him to the defendants, but that he did not consider the cider as the property of Saunders and Co., the defendants, until it was delivered, according to the agreement, and that Hunt was his servant; which statement, Hunt confirmed. The officers seized the cider, and it was afterwards condemned in the court of Exchequer, as being the property of the defendant, William Saunders, found in an unentered place, and a verdict for 750l. was obtained against William Saunders, on an information filed by his Majesty's Attorney-General, for penalties under the statute 3 Geo. 3, c. 1, s. 25, in respect of the omission to enter the premises where the cider was deposited; and the same was paid by the defendants. After the making of the contract for the purchase of the cider, the same remained on the premises of the plaintiff, under the circumstances herein stated. After the seizure of the cider, the plaintiff made an application to the excise for it's restoration, stating in his memorial the fact of the sale to Saunders, but claiming the cider to have been his property at the time of the seizure; but his application was refused. Hunt was the servant of Saunders, for the purpose of 2 E

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receiving and manufacturing the cider, but was the servant of the plaintiff for the purpose of retaining the cider until payment should be made of the price by the defendants.

Tindal, for the plaintiff. The plaintiff is entitled to re-The only question is, whether the property was in the defendants at the time of the seizure, so as to make the price payable then; and that depends upon the question, whether any thing remained to be done by the plaintiff, before the delivery to the defendants. Now nothing remained to be done by the plaintiff, before the delivery to the defendants; but if something did remain to be done, it was rendered impossible by the wrongful act of the defendants. By the terms of the contract, the cider was to be manufactured upon the plaintiff's premises, and it is clear from the whole of the contract, though it is not expressly stated, that it was to be manufactured by the defendant's servants, and Hunt, who was the defendant's servant, did, in fact, superintend the manufacture. For the purposes of this contract, the juice was cider the moment it was expressed from the apples; the contract speaks of the sale of cider; the case states that cider was delivered to Hunt, the defendant's servant; therefore, the sale and delivery were complete as soon as the cider was put into the casks, and handed over to Hunt, for the purpose of being further manufactured by him. The arrangement that the cider should be delivered at Totness, in the spring, will be relied upon for the defendants, as shewing, that in the intermediate time the sale was incomplete; but that was introduced only for the purpose of defining the time of payment, and not the time of sale, as appears by what follows, namely, that one half the price should be paid at Christmas, and the other half when the cider was The stipulation that the cider should be removed in the spring, was a mere mode of shewing that the payment of the price was to be completed at that time;

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but if it was more—if it meant that it was the duty of the plaintiff to deliver the cider at Totness; still, as the defendants have by their own wrongful act rendered the performance of that duty impossible, they cannot be heard to complain of its non-performance. Co. Litt. 207; 1 Roll. Abr. 450, l. 50 (a). But the cider was seized on the 3d of January, before such a delivery, even if the plaintiff was bound to make it, was necessary; and through whose default? Clearly not through the plaintiff's default, for he had sold the cider, and the defendants had accepted it, and were in the course of completing its manufacture; they therefore were the persons who made the cider, and were bound to make the entry; for the statute does not require, that the party who merely expresses the juice from the apples, which was all the plaintiff in this case did, shall make the entry. The cider was seized in the first instance, as the property of the defendants, and the condemnation of it in the Court of Exchequer, is conclusive to shew that it was their property; because the Court had an exclusive right to determine that question; and the determination of that court, being a court of Record, is final and conclusive: Scott v. Sheerman (b), Hughes v. Cornelius (c); and indeed there are many cases in which the record, even of a foreign court, has been held to be conclusive, which will be found collected in Starke's Evidence, 238. The case states, that the plaintiff eventually applied to the excise for a restitution of the cider, claiming it to be his property at the time of the seizure; but that fact cannot operate against him, because he did it under the idea that he still possessed a property in the cider, not having been paid the price. [Abbott C. J. He had a lien for the price].

F. Pollock, contra. The property never vested in the

<sup>(</sup>a) See Warburton v. Storr, Ante, vol. vi., 213. Grazebrook

<sup>(</sup>b) 2 W. Bl. 977.

<sup>(</sup>c) 2 Show. 232.

v. Dayis, ante 295.

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defendants, so as to give the plaintiff a right of action for the price, by virtue of the contract; and the seizure and condemnation could not give him any such right. The price of five hogsheads of cider, which were lost in the course of manufacture, are not claimed by the plaintiff; and the others, which were lost by the seizure and condemnation, are in precisely the same situation with them. The stipulation respecting the mode of payment, does not affect the case. A contract to pay a part of the price before the manufacture, is quite consistent with a contract to deliver after the manufacture. There was no cider in existence at the time when the contract was made. The cider was, undoubtedly, to be manufactured upon the plaintiff's premises, and the raw material was delivered to the defendants for the purpose of the manufacture; but a delivery of the raw material for the purpose of manufacture, is not a delivery of the manufactured article, and could not vest in the defendants the property in the cider, when, at a subsequent time, made. The whole contract was executory; nothing was to be claimed till the manufacture was complete; and even after that the plaintiff was bound to deliver the cider at Totness before he could claim the price; Astey v. Enny (a). there had been no written contract, the delivery of the juice to Hunt, for the purpose of his manufacturing it into cider, would not have been such a delivery as would have taken the case out of the Statute of Frauds; it did not vest any right, or interest, or property, in the cider, in the defendants: and if any accident had happened by which the whole of the juice had been lost or damaged, he could not have maintained any action in respect of it. [Bayley. Suppose the defendants had taken away the juice, as you call it, in its then state?] Then there would have been evidence to go to the jury in support of an action for goods sold and delivered; but the plaintiff could not support such an action, because there was no evidence of

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any delivery or acceptance: the only right the defendants had, was a right at some future time to call upon the plaintiff to perform an executory contract; and therefore, they could not be liable in this form of action, Tempest v. Fitzgerald (a). [Bayley, J. In that case the defendant never had possession under the contract]. Nor had the defendants in this case a general possession under the contract; they had only a qualified possession, for a particular purpose; and that did not pass the property-Unless the defendants had a general right of property, it did not vest in them; and it is clear, that they had not any such right, for they had no authority to remove the goods until after the seizure took place. [Bayley, J. They had a right over the goods for all the purposes of manufacture]. Yes; but for those purposes only; they had no general right; they could not remove them. The property, therefore, had not passed, and this action is not maintainable. The plaintiff has not delivered according to his contract, and his declaration will not apply to the excuse which he now sets up for that non-delivery, namely, that the delivery was rendered impossible by the wrongful act of the defendants. The plaintiff has declared for goods sold and delivered, and for goods bargained and sold, and he has proved a contract to sell and deliver certain raw materials, when they should have been manufactured; consequently, he cannot maintain any one of his counts: if he meant to rely upon what he calls the wrongful act of the defendants, he should have declared specially, alleging the commission of that wrongful act, per quod the goods were seized and condemned. Then as to the seizure; the record of the condemnation in the Court of Exchèquer does not apply, because it is not evidence between these parties. The record in that Court was not a proceeding in rem, but only in personam, and therefore is not conclusive to shew that the property was in the defendants. The plaintiff, if there was any crimen,

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was most clearly particeps criminis. The goods were not condemned as the property of the defendants; they were condemned merely because they were found deposited in an unentered place. The plaintiff told the excise officers a falsehood, and that was the whole offence, and was the means of working the forfeiture of the goods. If there was any fraud committed, the plaintiff must have known of it, and was in effect a party to it; that being the case, he could not have recovered in a special action founded upon the fraud, because he could not have come into Court with clean hands: and then it follows that he cannot maintain any action at all, because whatever degree of delictum there may be on the part of the defendants, he is himself in pari delicto; he is not rectus in curiâ, and has no right of action at all.

Tindal, in reply. There is no evidence of any fraud committed or known by the plaintiff; and the Court, in the absence of proof, will not presume fraud. But it does appear upon the case that the defendants have committed a legal fraud, a fraud upon the excise laws, by omitting to enter the place where the cider was deposited; and the Exchequer record, stating the penalty inflicted upon and paid by them, was evidence, if not conclusive evidence, of their guilt. [Bayley, J. No, I think not. It does not appear to me to be under any circumstances, evidence, of their guilt; and it would clearly not have been admissible as such at the trial of this cause. The conviction of the defendants, in the court of Exchequer, may have been mainly procured by the evidence of the plaintiff; and besides, it was not a proceeding in rem: it was res inter alios acta, and not receivable as evidence in this case]. It is not important to press that point. At least the Exchequer record shews that the cider was the property of the defendants when seized, and that it was seized and condemned as their property. [Littledale, J If the word cider, in the contract, meant the juice when first expressed from the apples, it seems to me that the

property vested in the defendants, by the delivery to Hunt. If it meant cider, in the general acceptation of the word, I think the property did not vest. The whole question appears to me to depend upon the meaning to be given to the word cider in the contract]. The case finds that in the country where the contract was made, and the parties lived, cider means the juice as first expressed from the apples; therefore, in that view of the question, that finding decides the action in favour of the plaintiff.

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BAYLEY, J. (a). If there had been a contrivance between the plantiff and the defendant to hold out the former to the public as the manufacturer and owner of the cider, and if there had been satisfactory evidence that the transaction was fraudulent, with a view to deceive the officers of excise, I should have thought that both parties were in pari delicto, and that the plaintiff, therefore, could not maintain this action. There is, certainly, some suspicion attaching to the case; but I think not sufficient to justify the presumption of fraud. bargain is for the sale of the plaintiff's cider, at 35s. per hogshead, to be delivered at Totness, in the spring of the year 1820, and to be manufactured on the plaintiff's premises. Cider is an equivocal term; it may mean the juice when first expressed from the apples; or it may mean the manufactured article when the process is complete. Which meaning did it bear in this case? We must look to the conduct, the language, and the situation of the parties, in order to answer that question. The case finds that the juice when first expressed from the apples, is, in Devonshire called cider; that, therefore, seems to have been the subject matter of the bargain, and the thing actually sold. If the plaintiff was to manufacture the cider, the contract would probably have provided for the mode in which the manufacture should be conducted: but it is silent upon that subject. Then what did the

<sup>(</sup>a) Abbott, C. J., was gone to Guildhall.

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parties do? Hunt was employed by the defendants; the apples were pounded; and the juice was put, part into casks belonging to the plaintiff, and part into casks provided by the defendants. Hunt was directed by Saunders to see that the casks were full; and payment was to be made, not according to the quantity of manufactured cider, but according to the quantity of juice: clearly shewing that by the word cider, the parties meant the juice. Then, the juice being the thing bargained for, it seems to me that there was a delivery of it to the defendants, and that the property in it vested in them; for the case then stands thus:-The plaintiff bargains to deliver apple juice; that when it has been made into cider, he will carry it to Totness; and that it shall remain on his premises until the price shall be paid. The juice, therefore, is to be considered as goods bargained and sold, or goods sold and delivered; and an action for the price of them was maintainable, as soon as the period fixed for the payment arrived. That period was the spring of the next year, and in the meanwhile, the plaintiff was to have a lien upon the goods for the price. Before the spring arrived the goods were seized, and became lost to both parties; and that loss was occasioned not by the wrongful act of the plaintiff, but of the defendants, who must therefore bear the consequences. It was their duty to enter the place in which the cider was to be manufactured, and this neglect in that respect rendered it impossible for the plaintiff to deliver the cider at Totness; therefore, that non-delivery did not destroy the plaintiff's right to recover the price, whenever the period fixed for the payment of it arrived.

HOLROYD, J.—I am of opinion that the plaintiff is entitled to recover. I think this was clearly a contract for the sale, not of manufactured cider, but of the raw apple juice, and that the cider was to be manufactured

premises during the period of manufacture, as a security for the price. I think there was not sufficient evidence to affect the plaintiff with the fraud practised upon the revenue, because it is clear that Hunt was not his servant, but the servant of the defendants. It is said that the form of action is bad, for that this was an executory contract, and that the juice, or cider, cannot be considered either as goods bargained and sold, or as goods sold and delivered. I am of a different opinion. I think it may be so considered, though the price was to be paid at a subsequent time, and then that though the contract was partly executory, still as it was partly executed, and the juice was delivered, indebitatus assumpsit was maintainable. In Buller's Nisi Prius (a), it is said, "although an indebitatus assumpsit will not lie upon a special agreement till the terms of it are performed, yet when that is done, it raises a duty for which a general indebitatus assumpsit will lie." This is the reason why, in declaring upon the sale of a horse, it is usual to introduce two counts, one upon an executory contract, and the other upon a contract executed: though it is clear that after delivery the action would be maintainable upon the latter (b). The property was altered from the moment when the juice was delivered to Hunt, and any subsequent loss which happened without fault on the part of the plaintiff, must have fallen

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LITTLEDALE, J.—I also think the plaintiff ought to recover. There is no direct evidence of fraud on the part of the plaintiff; there are some suspicious circumstances con-

upon the defendants. The plaintiff had a right of action for the price, as soon as the time limited for the payment expired, and the non-delivery at *Totness* did not bar that right, because that was occasioned by the wrongful act of

(a) 139.

the defendants.

(b) Noy, 88. 7 East, 571.

## CASES IN THE KING'S BENCH.

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nected with his conduct: but the Jury have not found fraud, and we cannot presume it. The case turns entirely upon the meaning of the word cider in the contract. The word being ambiguous, parol evidence was admissible to explain its meaning; the case finds that it meant the raw juice; and I think all the facts concur to shew the same. If so, the property passed to the defendants, as soon as Hunt, who was their servant, received possession. If the juice was the thing sold, it was the duty of the defendants to enter the premises. The form of action is unobjectionable, for as soon as the juice was expressed, and delivered to the defendants, it became goods sold and delivered.

Judgment for the Plaintiff.

Friday,

2d June.

In replevin for taking a stranger's cattle for rent in arrear, a plea, that the cattle " were not levant and couchant in the close in which, &c.," is bad on demurrer, for not shewing the circumstances under which the cattle came upon the close, so as to entitle them to be privileged from distress.

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DECLARATION in replevin, to which defendant avows, that being seised of the locus in quo, he demised the same amongst others to J. S., and for rent in arrear distrained the cattle in question, being on the close in which, &c. Plea in bar, that the cattle were not levant and couchant on the close in which. &c. Demurrer, assigning for causes, first, that it is not alleged in and by the said plea in bar that the cattle escaped into the place in which, &c., by the default of the owner or tenant thereof; and, second, that it is not averred in the said plea, from what cause or under what circumstances the cattle came upon the close in which, &c. Joinder in demurrer.

R. V. Richards, for the avowant, in support of the The plea in bar is clearly bad for the causes demurer.

assigned. Where a distress is taken for rent in arrear, it is not sufficient in the plea to the avowry to say, merely, that the cattle were not levant and couchant, but the party must go on and bring himself within the excepted case of protection, namely, that the cattle came upon the land through the default of the tenant or owner. The general rule of law is; that all goods and chattels found on the land are distrainable by the landlord for rent in arrear, and if a stranger's good are distrained, they can only be protected by his shewing that they came upon the land by the default or neglect of the landlord or tenant. The case of Kempe v. Crewe (a), is an authority to shew that such a plea would be bad on demurrer, and the course pointed out in that case has been here adopted.

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Maule, contrà. It is submitted that this plea in bar is good in substance, and that the case of Kempe v. Crewe, is an authority for upholding it. The general rule laid upon this subject by Mr. Justice Blackstone, in his Commentaries (b), is this:—" With regard to a stranger's beasts which are found on the tenant's land, the following distinctions are, however, taken. If they are put in by consent of the owner of the beasts, they are distrainable immediately afterwards for rent in arrear by the landlord. So, also, if the stranger's cattle break the fences, and commit a trespass, by coming on the land, they are distrainable immediately by the lessor for his tenant's rent, as a punishment to the owner of the beasts for the wrong committed through his negligence. But if the lands were not sufficiently fenced so as to-leep out the cattle, the landlord cannot distrain them till they have been levant and couchant on the land." And a little further on he says, "yet if the lessor or his tenant were bound to repair the fences and did not, and thereby the cattle escaped into their grounds, without the negligence or default of the

<sup>(</sup>a) 1 Ld. Raym. 1577. Lutw. (b) 3 Bl. Com. lib. 3, c. 1, p. 8 \$6.9.

Jones v. Powell. owner; in this case, though the cattle may have been levant and couchant, yet they are not distrainable for rent till actual notice is given to the owner that they are there, and he neglects to remove them, for the law will not suffer the landlord to take advantage of his own or his tenant's wrong." Admitting this to be the case, still the levancy and couchancy of the cattle is a material issue, without regard to the question, whether the landlord or tenant was or not in fault. For this, the case of Kempe v. Crewe is an authority, because although in that case it was incidentally suggested that a plea in this form might be bad on demurrer, still the decision of the Court, as it stands on the record, is favourable to this case, inasmuch as a similar plea was there pleaded. That was trespass for breaking and entering plaintiff's close, and taking and impounding three cows. The defendant justified under a distress for rent due to him from a third person. plaintiff replied that the cattle were not levant and couchant: upon which issue was taken, and verdict found for the plaintiff; and on a motion made for a repleader, on the ground that this was an immaterial issue, the Court, after much argument, gave judgment for the plaintiff. In substance this plea in bar is good, and entitles the plaintiff to judgment.

Richards, in reply. Kempe v. Crewe is an authority to shew that upon demurrer this plea is bad, and the only ground for refusing the repleader in that case was, that after verdict, the Court would intend that the issue was material. The question here, is not whether the cattle are or are not distrainable under particular circumstances, before levant and couchant; but whether the plaintiff ought not to have shewn that the cattle were not distrainable by operation of the general rule of law, which primâ facie subjects every thing on the land to distress for rent. Here the plaintiff ought to have set forth the special matter, and bring himself within the exception which exempts a

stranger's cattle from distress. That this is the proper course to be pursued, Poole v. Longdill(a), Com. Dig. Plea, M. 3, Dovasten v. Payne (b), are authorities.

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BAYLEY, J. (c).—I think the plea in bar is bad for the objection taken to it by Mr. Richards. The general rule of law is, that the landlord has a right to distrain every thing upon the premises for rent in arrear. There are exceptions to that rule; but the party meaning to rely upon the exception must bring himself within the limits of it. Here it is merely pleaded, that the cattle were not levant and conchant. Is that any objection per se? Certainly not. The authorities are, that if the cattle are not levant and couchant, and the owner can shew that they got upon the premises, not with his connivance nor by his default, then the party entitled to the rent is not warranted in distraining. If the cattle get upon the premises with the owner's consent, or through his default, it is quite immaterial whether they were levant and couchant. It is the duty of every man who is the owner of cattle, which have been distrained, to shew, if he claims exemption, the ground on which he seeks to protect them, because the circumstances under which the cattle got upon the premises must be presumed to be peculiarly within his knowledge. It seems to me, therefore, not sufficient for the party to say, that they were not levant and couchant, but that he must go on and shew under what circumstances the levancy and couchancy was material. The case of Kempe v. Crewe is a very clear authority upon that point. That was tresspass for taking the plaintiff's cattle. The defendant justified taking the cattle upon land demised to one Williams for rent in arrear. The plaintiff replied merely, that the cattle were not levant and couchant. The avowant took issue on that fact; and on being found for the plaintiff, a motion was made for a re-pleader, but refused, on the ground that

<sup>(</sup>a) 2 Saund. 290.

<sup>(</sup>c) Abbott, C. J., was sitting at

<sup>(</sup>b) 2 H. B. 527.

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after verdict, the materiality of the issue should be intended, if it might be material. In that case, the levancy and couchancy might have been material, if the cattle came upon the land without any default on the owner's part, and without his consent; issue having been taken upon that fact, and found for the plaintiff, the Court said, that after verdict, it shall be presumed to have been a material issue. But in that case the Court said, that if the replication had been demurred to, then it must have been taken more strongly against the plaintiff, and then it would have been ill. Here the defendant has taken advantage of the objection upon demurrer, which I think he was entitled to do. But there is another objection in this case, which would entitle the defendant to judgment. The defendant avows, that the tenant held and enjoyed the close in which, &c., amongst other lands, as tenant. plaintiff pleads in bar, that the cattle were not levant and couchant on the close in which, &c.: That is very like a negative pregnant, for that might be true, and yet they might have been levant and couchant upon some part of the lands demised.

Holboyd, J.—I also think that the plea in bar is bad on both grounds. The case of Kempe v. Crewe is an anthority to shew that the first objection would be clearly fatal on demurrer, and I think that decision is correct. It is a general rule, that all things found on the demised premises are distrainable for rent in arrear. In seplevin, therefore, the avowant, or person making cognizance, merely alleges the circumstance of the cattle being upon the premises, and that is sufficient to bring them within the general rule. All the exceptions to that general rule must be pleaded in the plea in bar, before it will be an answer to the avowry. This is the case of cloth delivered at a tailor's house, corn sent to a mill, or other things, which are protected and privileged for the benefit of trade. So of a stranger's beasts found on the tenant's

lands, they are protected, but the ground of protection must be specially set forth. The mere plea, that they were not levant and couchant would not be sufficient, because that raises an immaterial issue. All the circumstances entitling the cattle to be privileged from distress, must be set forth, and as that has not been done in this case, I think the plea in bar is bad and the defendant entitled to judgment.

LITTLEDALE, J., concurred.

Judgment for the defendant.

In the matter of John Burt and Andrew Burt.

IN Michaelmas term last, E. Alderson had obtained a rule nisi for setting aside the award in this case, upon grounds specified in the said rule.

Bolland and Sheppard now aboved cause, and objected, in the first instance, that the application for setting aside the award came too late. The award was published on the 1st day of Jane, 1825, and the first day of be made for Trinity full term was the 3d June, the essoign-day being the 30th May. The motion, therefore, to set aside the award ought to have been made in Trinity term, according to the provision of the statute 9 & 10 Wil. 3, c. 15, which requires that the application for setting aside an the term award shall be made "before the last day of the next term after such arbitration made or published to the parties." 9 & 10 W. 3, The question is, whether the essoign+day of the term is to be accounted as the first day of the term; for, if it is not, then this application ought to have been made in Trinity term, and came too late in Michaelmas. They cited Anderson v. Coxeter (a), Lucas v. Wilson (b), Lowndes v.

(a) 1 Stra. 301.

(b) 2 Burr. 701.

1826. Jon es v. POWELL.

Monday, 5th June.

Where an award was published in the interval between the essoign-day and the first day of full Trinity-term: Held, that a motion might setting it aside in the following Michaelmas-term, the essoign being considered the first day of within the

1826. In re Burt. Lowndes (a), Zachary v. Shepherd (b), and Pedley v. Godard (c). It is submitted, that the first day of Trinity term was the 3d June, and the essoign-day is no part of the term within the meaning of the statute. The 32 Hen. 8, c. 21, which regulates the commencement of Trinity term, distinguishes between the essoign-day and the first day of full term, and enacts, "that Trinity term shall begin the Monday next after Trinity Sunday, for the keeping of the essoigns, proper returns, and other ceremonies heretofore used and kept, and that the full term of the said Trinity term shall begin the Friday next after Corpus Christi day." The statute 9 & 10 Wil. 3, clearly contemplates the full term, because it is only in full term that a motion to set aside the award could be made.

Alderson, in support of the rule. For many purposes the essoign-day is considered and accounted as part of the full term; and it is submitted, that, in point of law, it ought to be so considered in the present instance. In Laidler v. Elliott (d), which was the last case upon the subject, it was held that the interval between the essoign-day and the full term could not be considered as part of the preceding vacation; and Bayley, J., there said, "Until times comparatively modern, one of the Judges always went down to Court on the essoign-day, for the purpose of opening the term, and hearing the essoigns. That is, therefore, a part of the term." Upon this authority it is clear that the present application need not have been made until Michaelmas term.

ABBOTT, C. J.—We think that the essoign-day of the term ought to be considered as the first day of the term, for the purpose of this act of parliament. It is so considered for a great many purposes in other cases, and I think it ought to be so in this. It is true that in entering

<sup>(</sup>a) 1 East, 276.

<sup>(</sup>c) 7 T. R. 78.

<sup>(</sup>b) 2 T. R. 781.

<sup>(</sup>d) Ante, vol. v., 635. 3 B. & C. 738

up judgment on a warrant of attorney, it must be sworn that the defendant was alive within the full term; but still, as there are many cases which have held that the essoign-day must be considered, for some purposes, as the first day of the term, I think we are warranted in holding in this instance that *Michaelmas* term was the term next after the award made, and consequently that this rule was moved for in time.

1826. In re Burt.

BAYLEY, J., and HOLROYD, J., concurred.

LITTLEDALE, J., was absent.

The grounds for setting aside the award were then considered, and, in the result, the rule was discharged.

## SHAW v. Robinson.

THIS was a rule calling on the plaintiff to shew cause why the bail bond given in this case should not be delivered up to be cancelled, and why the defendant should not be discharged out of custody on filing common bail. 'The ground of the motion was, that the defendant was arrested by the initial of his Christian name only, as "J. Robinson."

Barstow, upon shewing cause, took a preliminary objection to the form of the affidavit upon which the rule was obtained. It was entitled in a case of "W. Shaw against J. Robinson," thus following the very error of which the length in its defendant complained. It ought to have been "John Robinson, arrested as J. Robinson." He submitted, that this was a fatal informality, and that the defendant could

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The affidavit in support of a rule to discharge the defendant out of custody, upon the ground that the writ described him by the initial of his Christian name only, must set out the defendant's Christian name at full

CASES IN THE KING'S BENCH,

SHAW U. ROBINSON. not use the affidavit; consequently the rule must be discharged.

Curwood, contrà, insisted that the form of the affidavit was correct. The defendant's complaint was, that he was improperly arrested in the cause, as described in the writ by the plaintiff; and therefore he could not entitle his affidavit in any other way, for the only cause yet before the Court was one against "J. Robinson."

Per Curiam.—The affidavit is improperly entitled. The defendant should have described the cause in his affidavit, as he contended it should have been described in the writ. He complains that there is no cause against "J. Robinson," properly before the Court, and yet brings such a cause before the Court himself. The rule must be discharged, for the defendant cannot use this affidavit.

Rule discharged.

Monday, 5th June.

HURST and others v. JENNINGS.

Where A. gave certain creditors a bond in the common form conditioned for the pay-

ON shewing cause against a rule nisi for withdrawing an execution under a fieri facias, the case was this:—The plaintiffs brought an action of debt on a bond executed by the defendant, dated 13th *November*, 1824, in the penal

ment of a sum certain; and at the same time executed a deed of the same date, reciting the bond, and declaring that it should be lawful for the obligees to commence an action thereon, and proceed to judgment whenever they should think fit; and that upon judgment being obtained they should be at liberty, at their will and pleasure at any judgment obtained on the bond, should stand as a security for payment to the obligees on demand, of all such sums of money as then were or might thereafter to them become due from the obligor:—Held, 1. That this was a contrivance to defeat the provisions of the warrant of attorney act, 3 Geo. 4, c. 39, and therefore void as against the other creditors of the obligor, who had become bankrupt;—And, 2. That the obligee having entered up judgment in pursuance of the deed, and taken out execution without assigning breaches, and executing a writ of inquiry, the case was within the provisions of the 8 and 9 Wm. 3, c. 11, s. 8; and the execution was set aside.

sum of 10,0001., conditioned for the payment to the plaintiffs of 8,000l. and interest, on the 13th January, 1825. By an indenture of the same date, stamped with an ad valorem stamp of 121., and made between the defendant of the one part, and the plaintiffs of the other part, reciting that the defendant was then justly and truly indebted to the plaintiffs in the sum of 3500l. or thereabouts, for goods sold and delivered, and money lent and advanced by them to him, and for a considerable part whereof, plaintiffs had received as a security, various bills of exchange, and notes of hand, not then at maturity; and that defendant, the better to enable him to carry on his trade and business, had occasion to raise a considerable sum of money, and for the purpose of raising the same, had applied to the plaintiffs, who had agreed to draw upon the defendant five several bills of exchange for 1000l. each, to bear even date with the indenture, and to be made payable respectively at 12, 15, 18, 21, and 24 months after date; and which bills of exchange, being accepted by the defendant, they, the plaintiffs, had agreed to get discounted, and to hand over the proceeds thereof unto him, the defendant. And then, after reciting the bond, it was by the indenture witnessed, that for declaring the purposes for which the bond was executed, it was agreed between the parties, and the defendant did thereby declare, that it should be lawful to and for the plaintiffs to commence an action upon the said bond or obligation, and proceed to judgment thereon, whenever they should think fit; and that upon judgment being obtained, plaintiffs, or the survivor of them, his executors, or administrators, should be at liberty, according to their or his own will and pleasure, at any time and from time to time, to issue one or more execution or executions, upon such judgment, as they might be advised and deem expedient. And the said parties did thereby for themselves respectively, and their respective executors, administrators and assigns, declare and agree, that the said bond or obligation was so made, and that any judgment to be

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obtained thereon, should stand and be as a security for payment to the plaintiffs on demand, and without any deduction or abatement whatever, of all such sum and sums of money, as then were or should or might at any time thereafter become due from the defendant to the plaintiffs, for goods sold and delivered, or to be sold and delivered, or for monies advanced, or to be advanced or paid by them, or either or any of them, to, for, or on account of the said five several bills of exchange thereinbefore mentioned; or to, for, or on any other account, or on behalf of defendant, or which plaintiffs, or either of them, had or might become liable for, or engage to pay for the defendant, or in or for which the defendant should at any time thereafter become indebted unto the plaintiffs, or either or any of them, onany account whatsoever, with lawful interest; and also for the purpose of effecting a full and complete indemnity to them in respect thereof, and of and from all actions, suits, oosts, charges, damages, and expenses, claims and demands. relative thereto. On or about the 21st January, 1825, the plaintiffs commenced an action by the said bond, and obtained judgment by nil dicit thereon, which judgment was signed on 3rd February, 1825. On the 14th January. 1826, the plaintiffs caused an execution to be sued out upon the judgment so obtained by them, directed to the sheriffs of London, who, by virtue of the said execution. levied upon the goods and chattels of the defendant for the sum of 84731. 12s. 10d. besides sheriff's poundage. The goods and chattels seized under the execution, remained. on the premises of the defendant on and after the 3rd February, 1826, on which day a commission of bankrupt was awarded against the defendant, under which he had been duly found and declared a bankrupt, and a provisional assignment of his estate and effects had been executed by the major part of the commissioners named and authorised in and by the said commission.

Rumball now shewed cause against the rule nisi for

withdrawing the execution. The object of this application is to take the opinion of the Court, as to the validity of this execution under the operation of the Bankrupt act, 6 Geo. 4, c. 16, s. 108, which provides, "that no creditor, though for a valuable consideration, who shall sue out execution upon any judgment obtained by default, confession, or nil dicit, shall avail himself of such execution to the prejudice of other fair creditors, but shall be paid rateably with such creditors." In the late case of Taylor v. Taylor (a), which in its circumstances was similar to the present, the Court (two of its members only being present), was of opinion that an execution issued upon a judgment obtained by default, confession, or nil dicit, and levied upon the goods of a bankrupt, before his bankruptcy, is not absolutely void, under the 6 Geo. 4, c. 16, s. 108, and therefore refused to set it aside on motion. The provisional assignee has mistaken his remedy with a view of trying this question. He ought to have brought either trover, or money had and received. The provision contained in the 108th section of the new Bankrupt act, is adopted from the Irish statute 11 & 12 Geo. 3, c. 8, s. 5 (b).

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ABBOTT, C. J. interposed, and intimated to the defendant's counsel, that he thought they had mistaken their course, in coming to the Court to have the execution withdrawn on motion. This was too important and general a question to be so decided; and therefore his Lordship suggested the propriety of having the facts stated in the form of a case, in order that the point might be solemnly decided.

Marryat, contrà, intimated that there were two other objections fatal to the execution, which the Court could have no difficulty in disposing of on motion; first, that the bond and indenture mentioned in the affidavit, was a mere

<sup>(</sup>a) Ante, 159; 5 B. & C. 392. 270; and Archbold's Bankrupt

<sup>(</sup>b) See Eden's Bankrupt Laws, Laws.

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contrivance to defeat the provisions of the Warrant of Attorney act, 3 Geo. 4, c. 39, s. 1(a), inasmuch as these two instruments, taken together, were, in substance and effect, a warrant of attorney to confess judgment; and second, that the statute 8 & 9 Wm. 3, c. 11, s. 8, had not been complied with, inasmuch as there had been no suggestion of breaches, or writ of inquiry executed before execution was taken out.

(a) The 3 Geo. 4, c. 39, s. 1, recites, that injustice had been frequently done to creditors by secret warrants of attorney, to confess judgments for securing the payment of money, whereby persons in a state of insolvency were enabled to keep up the appearance of being in good circumstances, and the persons holding such warrants of attorney, had the power of taking the property of such insolvents in execution, at any time, to the exclusion of the rest of their creditors; and for remedy thereof enacts, "that if the holder thereof shall think fit, every warrant of attorney to confess judgment in any personal action, or a true copy thereof, and of the attestation thereof, and the defeazance and indorsement thereon, in case such warrant of attorney shall be given to confess judgment in the court of King's Bench, or such a true copy thereof as aforesaid, in case such warrant of attorney shall be given to confess judgment in any other court, shall within 21 days after the execution of such warrant of attorney, be filed, together with an affidavit of the time of the execution thereof, with the clerk of the docquets and judgments in the court of King's Bench."

By section 2 it is enacted, "that if at any time after the expiration of 21 days next after the execution of such warrant of attorney, a commission of bankrupt shall be issued against the person who shall have given such warrant of attorney, under which he shall be declared a bankrupt, then and in such case, unless such warrant of attorney, or a copy thereof, shall have been filed as aforesaid, within the said space of 21 days from the execution thereof, or unless judgment shall have been signed, or execution issued on such warrant of attorney, within the same period, such warrant of attorney, and the judgment and execution thereon, shall be deemed fraudulent and void against the assignees under such commission, and such assignees shall be entitled to recover back and receive for the use of the creditors of such bankrupt at large, all and every the monies levied, or effects seized, under and by virtue of such judgment and execution.

And section 3, after reciting that the object of the said provision might be defeated by any person giving a cognovit actionem, instead of a warrant of attorney to confess a judgment, enacts the same provisions as to every cognovit actionem given by any defendant in any personal action, as were before enacted with respect to warrants of attorney.

Rumball then addressed himself to these points. The

ultimate effect of the indenture in this case, might be the same as that which would be attained by a warrant of attorney to confess a judgment; but unless it can be considered in terms, as a warrant of attorney, it does not come within the operation of the 3 Geo. 4, c. 39, s. 1. There is a great difference between a warrant of attorney given to confess a judgment, and an instrument of this description. A warrant of attorney is irrevocable, and deprives the party giving it of all power of defence, Odes v. Woodward (a); so does a cognovit actionem. This instrument amounts only to a covenant not to defend; but notwithstanding that, the plaintiff could not avail himself of it without suing in the regular way, and the defendant might still plead to the action. The only remedy which the plaintiffs would have upon the deed, would be an action of covenant for nominal damages, if, indeed, such an action would lie. The defendant might, in this case, have resisted the action by pleading to it. He has not done so; and therefore the instrument is different in its nature and effect from a warrant of attorney, to which species of instrument only the statute in question is applicable; and the Court will not so construe the act as to bring an instrument within its operation which is not within its very words. But, at all events, this is not the preper mode of setting The remedy under the second secaside the execution. tion, if any, in such a case as this, is by action of trover

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(a) 2 Ld. Raym. 766. 1 Salk. 87.

sary.

for the goods seized, or for money had and received, to recover the proceeds of the execution. In either of these forms of action, the question might be discussed more satisfactorily than on motion. Secondly, this is not a case within the 8 & 9 Wm. 3, c. 11, s. 8, inasmuch as the conditions of the indenture cannot be incorporated with the bond, so as to render the assignment of breaches necesHURST v.
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Marryat, F. Pollock, and Justice, contra, were stopped by the Court.

ABBOTT, C. J.—This is an application, in form, to compel the plaintiffs to withdraw an execution; but it is in effect to set the execution aside. Now, the Court has power over all executions issuing from itself, and has authority to set them aside if the purposes of justice require that they shall be set aside. This application is not made to vacate the deed or the bond, nor even to set aside the judgment; it is only to vacate the execution, and if we see that all that has been done, and which has led to the issuing of the execution, is a contrivance to evade the provisions of an act of parliament, or any principle of the common law, it is our duty to set the execution aside; and I am clearly of opinion that that which has been done in this case, has been done with that intent and purpose. It appears that the bond in question is conditioned for the payment of the sum of 8,000l. and interest, absolutely. That bond is accompanied by a deed, from which it appears, that the whole of the large sum mentioned in the condition, was not then due; but that, in fact, only the sum of 3,5001.; for the payment of a considerable part of which sum, promissory notes and bills of exchange not then due, had been received by the plaintiffs. It appears, also, from the recital in the deed, that a further sum was intended to be advanced by means of bills of exchange, to be drawn by the plaintiffs upon the defendant, who was to accept the same at long dates, which the plaintiffs were to get discounted, and hand the proceeds to the defendant. The bond and this deed are taken together, and the deed contains a clause enabling the obligees of the bond to commence an action on the bond, obtain judgment, and sue out execution upon it, at their own will and pleasure: and it is further agreed, that the judgment so obtained, shall be a security, not only for monies already advanced,

but for any monies which might thereafter be advanced. or ultimately become due. This, then, is in substance precisely the same as a warrant of attorney, upon which judgment had been obtained by nil dicit. Is not this, in effect, a contrivance to defeat the provisions of the statute 3 Geo. 4, c. 39, which requires, that all warrants of attorney to confess judgment shall be duly registered in the manner therein provided, in order that the world may have notice of their existence? It appears to me, most clearly, to be so, and on that ground, I think the Court are called upon to make this rule absolute. But I also think, that this is a contrivance to defeat another wholesome statute. namely, the 8 & 9 Wm. 3, c. 11, s. 8, which requires the assignment of breaches in actions upon bonds conditioned for the performance of covenants and agreements, and that there shall be a writ of inquiry to ascertain what is due upon the bond. The taking of these two instruments together, is, in my opinion, an evasion of the provisions of that act; and it is also an evasion, in my opinion, of the sound and wholesome rule of the common law, inasmuch as it is a contrivance between these individuals, by which one of them shall have the power, at any time he thinks fit, to place an execution upon the goods and effects of the other, whereby he may defeat creditors availing themselves of the bankrupt laws, in order to obtain a rateable distribution of the bankrupt's effects. Looking at this proceeding in these different views, it appears to me, that we shall be well warranted in making this rule absolute, and I think we ought to do so.

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HOLROYD, J. (a).—I am also of opinion that we ought to set aside the execution in this case. I think this is a case directly within the statute 3 Geo. 4, c. 39, or at least, that these instruments are a direct evasion of that statute, the object of which was to give publicity to warrants of attorney. By the first section, every warrant of attorney

<sup>(</sup>a) Bayley, J. was in the Bail Court.

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must be filed within 21 days after execution, in the manner therein pointed out. By section 2, if it has not been filed within that time, it is to be deemed fraudulent against the assignees under any commission of bankrupt afterwards issued against the party giving the warrant. There can be no doubt, therefore, that if the instrument in this instance had been a warrant of attorney, instead of a bond and indenture, the judgment and execution would have been void against the assignees, inasmuch as the requisites of the statute had not been observed. section recites, that the former provision may be defeated by a person giving a cognovit actionem, instead of a warrant of attorney to confess a judgment; and enacts, that every cognovit actionem, unless filed in like manner, shall be void against the assignees. What, then, is the effect of the deed in question? I think it is in effect a cognovit actionem, for it says, that it shall be lawful to and for the plaintiffs to commence an action upon the bond, and proceed to judgment thereon whenever they shall think fit; and that upon judgment being obtained, they shall be at liberty, according to their will and pleasure at any time, and from time to time, to issue one or more execution or executions upon the judgment, as they may be advised and deem expedient. Suppose an action brought in pursuance of this deed, what would there be to prevent the plaintiffs from saying that the defendant had acknowledged the action, and prevent them from entering up judgment forthwith? Nothing, in my opinion; and therefore it seems to me, that under the act 3 Geo. 4, c. 39, this is a proceeding which must be considered as fraudulent and void. But assuming it not to be a case within the very words of that act, still as this machinery has been resorted to for the purpose of evading its provisions, I think the Court is bound to set aside the execution which has been taken out upon the judgment entered up.

LITTLEDALE, J.—I also think that the execution

ought to be set aside, and that the Court would be fully warranted in doing so, under the stat. 8 & 9 Wm. 3, c. 11, without regard to the other objection. It appears from the affidavit in this case, that the bond is in the common form, for the payment of a sum certain, but that by an indenture of the same date, it was declared that the condition of the bond was for the performance of an agreement. Now, assuming that the agreement contained in that indenture had been mentioned in the condition of the bond itself, it is clear that the plaintiff could not have proceeded to execution without assigning breaches, and executing a writ of inquiry, under the statute of William. It might be objected to a proceeding under that act, that the deed is not connected with the bond, and that the one is contradictory of the other; and, therefore, to let in parol evidence to shew that the condition of the bond is different from that which the words of it import, would be contrary to law. Admitting that to be so, still, by an application to the equitable jurisdiction of the Court, if the Court saw that this deed was created for the purpose of evading the statute, I apprehend they would have power to stay the execution. There is no doubt that a court of equity would have set aside such an execution as this, before the statute of Wm. 3; but one of the objects of that statute was to give the courts of common law the same power as a court of equity, in affording relief to parties against an unreasonable demand of the whole penalty, where only small damages have been sustained. It appears to me, therefore, that we may so far give effect to the act, as to defeat this proceeding, which has clearly been resorted to for the purpose of evading its provisions. If this case does not fall within the words of the statute of William, still it is an evasion of it, and the Court has power to set aside the execution on that ground.

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Rule absolute.

1826.

Monday, 5th June.

In an action for tolls due to a corporation, the defendant, who had acquired the character of a corporator of action arose, but before trial, has no right to inspect the corporation books, and must still be considered as a foreigner quoad this action.

The Mayor and Corporation of BRISTOL v. VISGER.

In an action for tolls due from the defendant to the plaintiffs, in respect of divers goods, wares, and mertion, the defendant, who had acquired the character of a corporator after the cause of action

THIS was an action for tolls due from the defendant to the plaintiffs, in respect of divers goods, wares, and merchandise brought into the city of Bristol. The defendant to the ordinary affidavit, for leave as a freeman of the city of Bristol, to inspect such of the corporation books as had reference to the subject of this action.

W. E. Taunton, on a former day, obtained a rule nisi to discharge the rule above-mentioned, on the ground that the defendant, being a stranger to the corporation at the time the demand for the tolls was incurred, had no right to inspect the corporation books. The action was brought for tolls due and payable in respect of goods, wares, and merchandise brought into Bristol, before the 16th July, 1825, on which day, and not previously, the defendant was admitted a burgess of Bristol.

Tindal and Bompas now shewed cause, and contended, that, as the defendant was actually an admitted freeman at the time the original application was made, he was entitled to retain the rule for inspecting the corporation books, although the cause of action arose before his admission. They cited Rex v. The Fraternity of Hostmen in Newcastle upon Tyne(a), and The Mayor of Southampton v. Graves (b).

## W. E. Taunton, contrà, was stopped by the Court.

ABBOTT, C. J.—The question is, whether by the circumstance of this defendant having acquired a corporate character after the period of time to which this action relates, he is now entitled to inspect the corporate books, which,

<sup>(</sup>a) 2 Stra. 1233.

unless he had acquired the character of a corporator, he would have had no right to do. We are all of opinion, that as far as regards this action, and the subject of it, the defendant must be considered as a stranger to the corporation, and has no right to inspect its books. The rule, therefore, for setting aside the original rule must be made absolute.

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Rule absolute.

Dougan v. Bolland and others, assignees of Marsh and others, bankrupts.

Plea, nil debet, and issue thereon. At the trial before Abbott, C. J., at the Middlesex sittings in last Trinity term, a verdict was found for the plaintiff, damages 19991. 11s. 5d., subject to the opinion of the Court upon the following case.

The Local Paving Act, 50 Geo. 3, c. 147, appoints commissioners for forming, paving, and otherwise improving certain streets and other public passages and places in bankrupts the parish of St. Pancras, Middlesex, which are or shall be made on ground belonging to Joseph Lucas, Esq. The hands, their plaintiff was clerk to the commissioners appointed to liable to refund carry that act into execution. The defendants were the the full assignees of Messrs. Marsh, Stracey, Fauntleroy, and this extends to Graham, bankrupts, under separate commissions. The action was brought to recover the sum 1999l. 11s. 5d., re-bills belongceived by the bankrupts to the use of the commissioners. The third section of the act enacts, that the commis- ers, but sold sioners, or any five of them, shall put the act in execu-ers, The eleventh section enacts, that the commissioners shall, by writing under their hands, appoint a treasurer, clerk, and surveyor. The sixty-fourth section directs, that the commissioners may sue in the name of their clerk.

Monday, 5th June.

If under the Metropolitan Paving Act, 57 Geo. 3, c. 29, s. 51, bankers receive money on account of the commissioners, and become with such money in their assignees are amount: and the proceeds of Exchequer commissionby the bankDougan v. Boliand.

The fifty-first section of the General Public Act, 57 Geo. 3, c. 29, gives a preference to the commissioners of paving before all other creditors in the event of bankruptcy of the treasurer or other persons therein mentioned .- (See the section set out at length in the case of Frost v. Bolland (a). On the 20th of June, 1810, at a meeting of the commissioners under the said first mentioned act, certain proceedings took place, of which the following is a copy, as entered in the book of the commissioners kept in pursuance of the act:--" At a meeting of the commissioners held at the Boot public-house, on the estate, on Wednesday, the 20th day of June, present, (here the names of fourteen commissioners were inserted, and a copy of the notice of the meeting); Resolved, that Mr. Fauntleroy be appointed treasurer to the commission." Then followed other resolutions, and the entry concluded thus:-"Resolved, that this meeting do adjourn till Wednesday, the 18th day of July, at two o'clock precisely. -(Signed), James Burton." The said Henry Fauntleroy, from the 20th of June, 1810, until his bankruptcy, was, and continued to be, a partner in the late banking-house of Messrs. Marsh & Co., consisting of the said Marsh, Stracey, Fauntleroy, and the other persons hereinafter mentioned. The said commissioners under the Local Paving Act also, as such commissioners, employed Messrs. Marsh & Co. as the bankers of the said commissioners, as such commissioners, and a pass-book was kept, debiting Marsh, Sibbald, Stracey, Fauntleroy, and Stewart, to the commissioners for paving the estate of Joseph Lucas, Esq., which pass-book was headed or entitled thus:

Drs. Crs.

Marsh, Sibbald, Stracey, Fauntleroy, and Stewart. The commissioners for paving the estate of Joseph Lucas, Esq.

Stewart retired from the partnership in the year 1814, and Sibbald died in the month of September, 1819. Graham became a partner with the survivors on the 1st of May, 1814, and Marsh, Stracey, Fauntleroy, and Graham con(a) Ante, 384.

tinued from that time to be employed as the bankers of the commissioners until the time of their bankruptcy; and they, as such bankers, on the 24th of June, 1824, received Exchequer bills of and belonging to the commissioners, and for and on their account as such commissioners, amounting in value to the sum of 1750l. 17s. 2d., and a clerk of the bankers delivered to the commissioners a receipt, as follows:—

" No. 6, Berners-street, 4th June, 1824.

Received on account of the Lucas Paving, seventeen hundred pounds, in Exchequer bills.

For Messrs. Marsh, Stracey, Fauntleroy, and Graham, 1700l. 0s. 0d.

Joseph Golightly."

Marsh, Stracey, Fauntleroy, and Graham, as such bankers of the commissioners, afterwards, and before they became bankrupts as hereinafter mentioned, received the proceeds of the said Exchequer bills, amounting to 1750l. 17s. 2d., which sum, on the 13th of September, 1824, being the time of the bankruptcy of Marsh & Co., remained in their hands, together with the further sum of 2481. 14s. 3d., the balance of the account in favour of the said commissioners, and which sum of 2481. 14s. 3d., was collected and received by virtue of rates and assessments made under and by virtue of the said first mentioned act. On the 16th of September, 1824, a commission of bankrupt duly issued against Marsh, Stracey, and Graham; and on the 29th of October, 1824, another commission duly issued against Fauntleroy, and the defendants were duly appointed and became assignees under both commissions. The defendants, as such assignees, jointly, as well as separately, have received, and are possessed of, from and out of the joint estate, and also out of the respective estates of Marsh, Stracey, Fauntleroy, and Graham, more money than will be sufficient to pay and satisfy to the commissioners and the plaintiff the sums of 1750l. 17s. 2d., and 2481. 14s. 3d. On the 25th of January, 1825, the DOUGAN V. Dougan v. Bolland. commissioners by their then and present clerk, the plaintiff, did in writing demand, by and on the behalf of the commissioners, of and from the defendants, as such assignees as aforesaid, the payment of the said sums of 1750l. 17s. 2d., and 248l. 14s. 3d,; and after ten days had expired from the time of such demand, this action was commenced.

Chitty, for the plaintiff, was stopped by the Court, who called upon

F. Pollock, contrà. This case is distinguishable from the former case of Frost v. Bolland, in two respects. First, the eleventh section of the local act in this case, the 50 Geo. 3, c. 147, expressly requires, that the commissioners shall appoint the treasurer "by writing under their hands." Now the appointment of Fauntleroy as treasurer, was not signed by the commissioners, therefore it was not a valid appointment; and the bankrupts, as a firm, could not possibly be considered as the treasurers or bankers of the commissioners, for of them there was no appointment at all. Second, the plaintiff, at all events could not recover the amount of the Exchequer bills; for, in the first place, there was nothing to shew that the money to which they amounted was the produce of rates and assessments made under the act; and, in the second place, the proceeds of them could not be regarded as money received on account of the commissioners. The plaintiff might have maintained an action of trover, for the Exchequer bills themselves, and he might have proceeded criminally for their misappropriation; but he could not treat their supposed value as money in the hands of the bankrupts, and sue for it in this form of action.

Chitty, in reply. It was not necessary to shew any appointment of the bankrupts as treasurers at all. There was a regular course of dealing between the commissioners

as such, and the defendants, as their bankers, in the regular way of business, as between bankers and customers; and that was quite enough to bring the case within s. 51, of the general public act, which gives a preference to the commissioners before all other creditors, in the event of the bankruptcy of the treasurer, or other persons therein mentioned. With respect to the exchequer bills, as they themselves were received by the bankrupts on account of the commissioners, the proceeds of them, when sold by the bankrupts, and received by them, were clearly money had and received by them, to the use of the commissioners.

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The case was argued on a former day in this term, when the Court took time for consideration. Judgment was now delivered by

ABBOTT, C. J.—This case came before us upon a special case. It is not necessary to advert to its circumstances with any degree of nicety. The bankrupts had been bankers to the paving commissioners. They had not been appointed in writing, nor was there any other evidence of their appointment, except that they had been employed as bankers in the ordinary way in which private individuals employ a banker. The only question was, whether the house of Messrs. Marsh and Co. were persons within the meaning either of the local act, 50 Geo. 3, c. 147, or the general act, 57 Geo. 3, c. 29, receiving money on account of the commissioners. On a former occasion, in the course of the present term (a), in an action against these same defendants, the Court intimated its opinion that the parties were at liberty to act under the provisions of either of these statutes, according as they might think It appeared, in this case, that prior to the 57 Geo. 3, c. 29, Mr. Fauntleroy alone had been appointed treasurer, at a meeting of the trustees, but the appointment was not signed by any of the trustees except the chairman.

<sup>(</sup>a) Frost v. Bolland, ante, 384.

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Under the 57 Geo. 3, the appointment of treasurer is not required to be in writing, and it does not seem that the appointment of Mr. Fauntleroy, as treasurer, is at all material in this case, for he never acted as such, at least not for a considerable period of time prior to that when this transaction arose. There does not happen to be any mention made of bankers in the local act; and, therefore, the question arises, whether the bankrupts are persons within the meaning of the general act, 57 Geo. 3. Now it appears, by sec. 47 of that act, which, I believe, was not adverted to in the argument, that the legislature supposed the possibility, that money raised from the rates, might be paid into the hands of some person who was not the treasurer; for there is a provision there, that the collectors of the rates, shall weekly, and every week, pay to the treasurer appointed by the commissioners, or to such person or persons as they shall direct, all sums of money by each of them respectively collected, &c. That section, therefore, shews, that the legislature contemplated that there might be persons into whose hands the money would be paid, other than the treasurer; and as already intimated, the fact is, that the monies, in this case, were paid into the hands of Marsh and Co., in the ordinary way. The 57 Geo. 3, speaks of treasurer, officers, and persons appointed, and gives the commissioners power to appoint such treasurer and other officers and persons, as they may think requisite and proper, without requiring the appointment to be in writing. Then comes the 51st section, which is the important one upon which this question arises, and that section enacts, "that in case any treasurer or collector, officer, or other person, appointed by the commissioners, for the collection and receipt of monies, to be collected and received by virtue of any rates, &c., shall happen to die or become bankrupt, before he or they shall have fully paid and satisfied all monies received by him or them, for or in respect of any such rates or assessments, or for or on account of the commissioners or trus-

been appointed; then, and in every such case, if such treasurer, collector, officer, or other person shall die, the executors, &c., or if he shall become bankrupt, the assignees shall, out of his estate and effects, pay to the said commissioners, or trustees, or to such other person as they shall direct to receive the same, all such sum and sums of money as shall have been collected or received by such treasurer, collector, officer, or other person appointed by the said commissioners, or trustees, and which shall be due and owing from him to the said commissioners or trustees, or other persons as aforesaid, by whom he or they shall have been so appointed," &c. First, it was contended, that the bankrupts could not be considered as persons appointed by the commissioners. But we are of opinion, that inasmuch as they were employed for a long period of time, by the commissioners, since the passing of this act of the 57 Geo. 3, (which does not require any appointment in writing), such employment must be considered as equivalent to an appointment; and therefore,

that there is no foundation for the objection taken in that respect. The second point made was, whether the two sums of money mentioned in the case, one of 1750l. 17s. 2d., and the other of 2481. 14s. 3d., were monies within the meaning of this act of parliament. Now, in this case, I may again advert to what fell from the Court in a former case. Upon reading the 51st section, we think it is not confined to money received by virtue of rates or assessments, but that it extends to all monies received for or on account of the commissioners or trustees, although not by virtue of rates and assessments. The fact is, that the smaller sum had been received in respect of the rates, and therefore, there can be no question as to that. With respect to the larger sum, it appears, that on the 4th June, 1824, Marsh and Co. received exchequer bills belonging to the commissioners, and for and on their account, in value to the amount of 1700l.; and it further appears,

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that those exchequer bills were sold by Marsh and Co. before their bankruptcy, and that the produce, amounting to 17501. 17s. 2d., remained in their hands at the time of their bankruptcy. When, therefore, they had sold the exchequer bills, the money received for them must be considered as received for the owners of the bills, who were the commissioners, and consequently must be treated as their property. We are, therefore, of opinion, that upon the construction to be given to the 51st section, the plaintiffs are entitled to judgment for both sums.

Postea to the Plaintiffs.

Monday, 5th June.

WARMOLL and another v. F. Young, Esq.

Where in an action for a false return to a fi. fa., the sheriff (who was not indemnified) proved that the goods of the debtor were absorbed by a prior execution :-Held, that the give evidence to shew that the prior execution was concocted in fraud, it appearing that paid over the money, in defiance of notice to retain

CASE against the late Sheriff of the county of Surrey, for a false return of nulla bona to a writ of fieri facias, indorsed to levy, at the suit of the plaintiffs, 2031. on the goods and chattels of one Robert Gooch. Plea, the general issue. At the trial, before Abbott, C. J., at the Sittings in London, after last Michaelmas term, it appeared in evidence, that on the 17th December, 1824, the defendant executed a fi. fa. upon the goods of Gooch, on a judgment at the suit of one Knight, to whom Gooch had given plaintiff might a warrant of attorney, and that the net proceeds of that execution was 581. 9s. 6d. On the 20th of the same month of December, another writ of fi. fa. was delivered to the defendant, indorsed to levy 2031. on the goods of Gooch, at the suit of the plaintiffs, upon a judgment obthe sheriff had tained by them in the previous Michaelmas term. To this last writ the defendant returned nulla bona, and it was proved in evidence as a fact, that all the effects of Gooch

the proceeds in his hands until the first execution was set aside; and, consequently, that the sheriff was liable for his misconduct, in lending himself to the other party.

had been absorbed by the execution at the suit of Knight. On the 29th December, the plaintiffs caused the defendant to be served with a notice to retain in his hands the amount of the levy under the first writ; and he was thereby apprised that they intended to apply to the Court to set aside the judgment and execution at the suit of Knight, on the ground of fraud. On the first day of Hilary term, 1825, the defendant was served with a rule to return the writ in the cause of Knight v. Gooch. No notice of this rule was given by him to the plaintiffs, and on the 31st of January the defendant, by the hands of his officer, paid over to Knight the net proceeds of the execution at his suit. No steps had, in the mean time, been taken by the plaintiffs to set aside the proceedings at the suit of Knight. It was objected, on the part of the defendant, that, as he had levied the whole of the goods under this latter execution, he was not liable to this action, having received no indemnity from the plaintiffs. The plaintiffs then proposed to shew that the judgment obtained by Knight was fraudulent and void, inasmuch as the warrant of attorney by virtue of which it had been entered up, was given for the express purpose of defeating the plaintiffs' execution. The learned Judge was at first inclined to think that such evidence was inadmissible, under the circumstances of the case, the sheriff not having been indemnified; but, on the authority of Kempland v. M'Cauley (a), he received the evidence, and upon the facts proved, he left it to the jury to say, whether the judgment and execution at the suit of Gooch, was founded in fraud, in order to defeat the plaintiffs' execution; for if it was, then the plaintiffs would be entitled to recover; if not, the verdict ought to be for the defendant. The jury found for the plaintiffs, damages 581. 9s. 6d., being the amount of the net proceeds of the execution at the suit of Knight, with liberty, however, to the defendant to move to enter a nonsuit, if the Court should be of opinion that the

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1826. WARNOLL v. Young. evidence received to invalidate the judgment at the suit of Knight was inadmissible. Accordingly, a rule nisi for this purpose was granted in Hilary term last, and the case of Tyler v. The Duke of Leeds (a), was cited. Against that rule.

Gurney (with whom was Campbell), now shewed cause. The evidence of fraud in the first execution was admissible in this action, although the defendant was not indemnified. The defendant, by his conduct in this transaction, has made himself liable to the plaintiffs for a false return to the writ, inasmuch as he has lent himself to the purposes of Knight, which he, as a public officer, had no right to do. The defendant received notice on the 29th December, to retain the amount of the levy in his hands, being at the same time distinctly apprised that the plaintiffs intended to move to set aside Knight's judgment and execution, on the ground of fraud. If, in defiance of such a notice, he thought proper to pay over the money to Knight, then the plaintiffs are entitled, in this form of action, to go into the consideration of the judgment and execution at the suit of Knight. The case of Tyler v. The Duke of Leeds, cited in support of this motion, is an authority in favour of the plaintiffs; for there, although Lord Ellenborough would not allow the defendants to go into a wide field of evidence, to show that the transaction between the then plaintiff and his debtor was fraudulent, yet he would have received direct evidence; shewing clear and palpable fraud in the judgment. Here it was shewn that the transaction between Knight and Gooch was a complete fraud, and concected for the express purpose of defeating the execution at the suit of the present plaintiffs. But, assuming it to be doubtful whether the plaintiffs, in this form of action, could try the validity of the prior execution, yet, as the defendant has lent himself to Knight, after notice, he stands in Knight's shoes, and must stand

(a) 2 Stark. N. P. C. 218.

or fall by the consequences of paying over the money to a person whom he is told has no title to receive it. 1826. Warmoll v. Young.

Marryatt and Comyn, contrà. In an action against the sheriff for a false return, it is a sufficient answer for him to shew that the goods of the debtor have been absorbed by a prior execution, and it is not competent for the plaintiffs to go into evidence impeaching the validity of that execution, unless the sheriff is indemnified. The sheriff is the officer of the Court, and he is bound, at his peril, to execute its process. He known nothing of the foundation of the writs which he is called upon to execute, nor is he privy to the proceedings of either party. But then, it is said, that in this instance the sheriff has lent himself to Knight, by handing over the proceeds of the levy, after notice that the validity of his execution is disputed. This, however, is not so; for the sheriff did every thing which he was bound to do under the circumstances. The notice to retain the proceeds is served upon him on the 29th December, with an intimation that an application will be made to set aside Knight's judgment and execution. He does retain as long as he can, without subjecting himself to an attachment; and it is only at the last moment that he pays over the amount of the levy to Knight, which he was bound to do. In the mean time, no steps are taken by the plaintiffs to set aside Knight's judgment and execution. The whole of Hilary term is suffered to elapse, without any proceedings for that purpose being taken; and it is not until the sheriff is compelled, by the fear of an attachment, that he pays over the money. Surely, under such circumstances, the sheriff had no other course to pursue. No fraud or connivance is attributable to him; and, therefore, it is extremely hard upon the sheriff, standing thus, between two fires, to be subjected to the expense of trying a question in which he has no interest, and rendered liable for the consequences of a supposed fraud, to which he has been in no way WARMOLL U. YOUNG.

privy. The defendant was not bound to take any notice of the information given him by the plaintiffs, that Knight's judgment was fraudulent. He, as the officer of the law, was bound to do his duty; and if the plaintiffs wished to try the question of fraud, they ought to have given the defendant an indemnity. In the case of Kemp v. M'Cauley, the sheriff was merely a nominal party to the suit, the real defendant being another creditor. The only case in which this question, as to the right of giving such matter in evidence, seems to have directly arisen, is Tyler v. The Duke of Leeds. That was an action against the defendant, as lord of the manor of Wakefield, for a false return of nulla bona to a mandate from the sheriff of York, upon a writ of fieri facias, to levy the sum of 4111. 3s. 11d., upon the goods of John Shaw. The bailiff had seized certain goods, by virtue of the mandate, as the joint-property of Shaw and one Bateman, of which Bateman was in the possession. Bateman having claimed the whole, as his separate property, the bailiff relinquished the property, on receiving an indemnity-bond from Bateman. On the part of the defendant, Scarlett proposed to shew, that the judgment against Shaw arose out of a fraudulent contrivance between the plaintiff and Shaw to defraud the creditors of the latter; and Lord Ellenborough said, "To say that the judgment is absolutely void, embraces too large a scope; it would endanger all returns; if you can shew that it is clearly void under the statute, I will admit the evidence—but it must be clearly and manifestly so; you cannot go into all the circumstances between the parties; the indemnity to the defendant may turn out to be insufficient. If you can attach the judgment on any clear and palpable ground, I will hear you." The evidence was, in that case, therefore rejected. In principle, as well as adverting to the particular circumstances of this case, it would be extremely hard to make the sheriff, who is merely a ministerial officer, a party to a question in which he can have no interest, especially in a case in which the

plaintiffs have not taken prompt steps to set aside the prior judgment, before they sought to make the defendant responsible.

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ABBOTT, C. J.—In this case we are not called upon to decide the general question, whether, in an action of this kind against the sheriff, it is competent for the plaintiff to shew that a judgment and execution under which the sheriff had previously levied upon the goods of the debtor, and paid the proceeds over, were fraudulent; because, if it appears from the evidence that the sheriff, by himself, or by his officer, whom he entrusts with the execution of the process, lends his aid to one party, and withholds it from another, the sheriff must stand or fall, by the rights of the party to whom he thinks fit to shew favour. Here it appears, that on the 29th December a notice was served, at the instance of the plaintiffs, on the sheriff, requiring him to retain the amount of the levy; and the notice proceeded to inform him, that the plaintiffs would take measures to set aside Knight's judgment. On the 23d January, the sheriff was ruled to return the writ. The rule had six days to run; and therefore he could not be called upon, by any course of proceeding, to pay over the money to Knight, until the expiration of the sixth day. At the end of the six days, the officer, not the sheriff himself (for he has never interfered), paid over the money to Knight's attorney. It appears to me, that it was the duty of the sheriff, when served with a rule to return Knight's writ, to inform the present plaintiffs, or their attorney, of it, in order that they might then consider whether they would take steps promptly to set aside the judgment. If he had informed them of that, and they had taken no steps until the expiration of the rule to return the writ, there would have been strong grounds for saying that the sheriff was bound to execute the process coming into his hands, at the suit of Knight, and to pay over the money. Not having so done, the sheriff appears to me to have lent

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himself to Knight, and having done so, he must stand or fall by the rights of Knight; and Knight had no right, because his judgment was most evidently fraudulent.

BAYLEY, J.—I think the evidence was properly received, and that the verdict is right. The evidence was admissible, not so much for the purpose of shewing that the judgment under which the first execution was sued out was void, but as shewing that the sheriff was not acting honestly and bona fide in the transaction; and L trust that the verdict in this particular case, and the admission of the evidence objected to, will have the effect of making sheriffs act houestly and bona fide in the execution of process. Here was a fraudulent judgment and execution, and afterwards an honest judgment and execution. The sheriff was not bound to try the question of fraud, or to decide which of the two parties was entitled to a preference. It was not for him to determine either of those questions. Therefore, when he had received a notice from the creditors who sued out the second fieri facias: that the first was questionable, and was intended to be disputed, the sheriff should have stood indifferent between the two parties, and ought not to have lent himself either to the one or to the other. He certainly was not bound to incur any expense, and if he had applied to the Court to be relieved from returning the writ until the parties settled the question between them, probably he would have been relieved; but having received notice from the present plaintiffs, that the prior execution was fraudulent, he might, without any expense to himself, have sent a measage, or written a note to the plaintiffs' attornies, informing them that he had been served with a rule to return the writ, which rule expired on the 31st January, and unless they took some steps in the mean time to prevent it, he should be forced, by the rule of Court, to pay over the money to Knight, the plaintiff in the first execution. That course, however, he did not think proper to adopt;

and, instead of it, his officer too readily lent himself to Knight, in order to give him the preference. I am, therefore, of opinion, that in this case the sheriff became liable by the act of his officer.

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HOLROYD, J.—I am of the same opinion. It is said that the sheriff is bound to obey the process of the Court. No doubt he is; and if he had obeyed it honestly and bona fide in this case, I should have thought this action not maintainable. By the writ of fi. fa., the sheriff was not commanded to levy the money and pay it over to the plaintiff in the cause, but to levy and return the proceeds into Court at the return of the writ, in order that it might be paid over to the plaintiff in satisfaction for his damages. Writs of execution, as well as other process, issue at the peril of the parties who sue them out; and therefore, when a sheriff levys under an execution, he is bound to retain the money in his hands, in order to allow other parties interested an opportunity of applying to the Court in case there be any thing improper in the execution which has been sued out; and if the sheriff were not bound to retain the money, it might in many cases be productive of mischievous consequences. sheriff, notwithstanding the notice he has received, that there is something wrong in the first execution, pays it over to Knight, instead of informing the plaintiffs that he had been ruled to return the writ, and giving them an opportunity of contesting the validity of Knight's execu-Under such circumstances, I think the evidence objected to was properly admitted, with a view of shewing the negligence of the defendant's conduct, and I think that the verdict was right.

LITTEDALE, J., was of the same opinion.

Rule discharged.

RUNCORN v. Dos. fine was levied. A verdict was then, under the directions of the Justices, found for the plaintiff. A bill of exceptions having been tendered and sealed, and the record having been removed into this Court by writ of error, two grounds of error were assigned:—first, that the Justices, in giving their opinion, that the fine was conclusive as a bar to the vicar, were mistaken in point of law; and second, that they ought to have left it to the jury to find, whether the person who levied the fine had, at the time, any estate of freehold, by right, or by wrong, in the land. Joinder in error.

Parke, for the plaintiff, in error. The direction of the Court below was clearly wrong in point of law. There was conflicting evidence as to the possession of the land, and the plaintiff endeavoured to turn the balance in his favour by proof of a fine levied. Now, that must be taken to have been a fine levied without proclamations, because no proclamations were proved; and such a fine was void, unless the person who levied it had an estate of freehold. Therefore, whether that person had an estate of freehold, or, in other words, whether the fine was valid, was a question of fact, which ought to have been left to the jury. For the purpose of getting over this difficulty, the Court below did ask the jury, whether the lessor of the plaintiff had been twenty years in possession; and they found that he had: but this Court will give that finding no legal effect. A question so put and answered cannot be judicially noticed; the jury are not sworn to answer isolated questions, put to them by the Judge; they are only sworn to find a general verdict. Non constat on what ground the jury answered this question as they did, for they have not found a special verdict, and they were not directed to dismiss from their minds the question respecting the fine. But, even if this Court can take notice of this finding, still it does not shew that the plaintiff is entitled to recover. The jury have not

found that there was an adverse, or a continuous possession; they have not found when the possession began, nor when it ended; they have not found what was the state of the church during the time. Now, as the demise was in 1822, and the trial in 1823, they might mean that the twenty years expired at the time of the trial only, which would not do; and besides, twenty years' possession will not give a title as against the church.

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Cross, Serjt., contrà. Looking at the evidence altogether, the Court will be of opinion that there was no misdirection. The fine was levied in 1797, and the ancestor of the lessor of the plaintiff was proved to have been in possession of the land in 1792, five years before. Now, primâ facie, possession is evidence of a seisin, at least, of an estate of freehold; and there was nothing to destroy the effect of that possession, because there was no proof of an adverse possession by the defendant: therefore the Court below were right in assuming that the party to the fine had an estate of freehold, and that the fine, consequently, was a conclusive bar. [Abbott, C. J. According to the evidence, the old bathing sheds must have been in existence at the time when the fine was levied]. Perhaps they were, but there was nothing to shew that they were crected adversely to the party then in possession, the ancestor of the lessor of the plaintiff. Then, even if the direction with respect to the fine was wrong; still, as the jury have found a possession of twenty years by the lessor of the plaintiff, the verdict is right. The rule of law, as laid down in Buller's Nisi Prius (a), is this:--" If the plaintiff prove that A. was in possession of the premises in question, and that the lessor is heir to A., it is sufficient, prima facie: for it shall be intended, that A. had seisin in fee, till the contrary appear. And if he prove that his lessor, or his ancestors, had possession for twenty years, without interruption, till the defendant obtains

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possession, it is a sufficient title; for, by the 21 Jac. 1, c. 16, twenty years' possession tolls the entry of the person having right; and, consequently, though the very right be in the defendant, yet he cannot justify ejecting the plaintiff."

ABBOTT, C. J.—I am of opinion that the judgment of the Court below ought to be reversed, and a venire de novo awarded. The question, and the only question before us, is, whether the direction of the learned Judge, that the fine was a conclusive bar to the right of the vicar, was correct in point of law. Now, it certainly could not be so, unless J. Cooper, the person who levied it, had possession of the land at the time; and whether he had or not, is, upon the whole of the evidence in the case, extremely doubtful. It ought, therefore, to have been left to the jury to decide that question. The jury were asked whether the lessor of the plaintiff had been in possession twenty years since the fine, and they found that he had, adding, that the right was in the vicar at the time when the fine was levied; and a verdict was then, under the directions of the Justices, found for the plaintiff. Even if the fact of this twenty years' possession had been found, with all the certainty and precision, the want of which has been complained of in argument, it would still be difficult to say that it sustained the judgment of the Court below, on the other point. But the finding of the jury on this point was extremely loose and unsatisfactory, and was, besides, accompanied and qualified by an observation in favour of the right of the vicar. Now, twenty years' possession is not conclusive, as against a vicar or rector, at least, if the incumbent has been changed in the course of that time: and whether there has been any such change in this case, there is nothing to inform us, one way or the other. It has been urged, that there is no evidence that the land ever belonged to any other person than the lessor of the plaintiff and his ancestors; but they had other lands on

both sides of the church-yard, and there was some evidence that this land had formerly been part of the church-yard. It seems to me, therefore, that the finding, upon the whole, is bad, and that the judgment given for the plaintiff below must be reversed.

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BAYLEY, J.—I am of the same opinion. A fine at common law is binding upon the parties, but it is not binding upon a stranger, unless made with proclamations. this case there were no proclamations, at least, no evidence of any was given; but even if there had been, still the fine would not be binding, unless there was in the party levying it, at that time, an estate of freehold, by right, or by wrong. Now, as it seems to me, there not only was not conclusive evidence to shew that the ancestor of the lessor of the plaintiff had an estate of freehold in the land, but there was strong evidence, on the contrary, to shew that before the fine the freehold was in the vicar. If it was in the vicar, the lessor of the plaintiff's ancestor could not afterwards obtain the freehold as against the vicar, by right, because the vicar had no power to alien; and then the only question is, did he obtain it, as against the vicar, by wrong? And of that there is nothing like conclusive or satisfactory evidence. Then as to the twenty years' possession by the lessor of the plaintiff, the finding of that fact is not, as it ought to be to render it available, in clear, precise, and definite terms; for it does not state whether the possession was adverse or continuous, or when it began or ended. That, therefore, is an insufficient finding, and will not support the judgment.

The other Judges concurred.

Judgment reversed, and a venire de novo awarded.

Wednesday, 7th June.

Where a defendant had entered a cause in the Marshal's book, with a mark of ne recipiatur: and the plaintiff brought the cause on entry, as an undefended cause, and obtained a verdict, the Court set aside the verdict for . irregularity.

#### WATSON v. GOWAR.

CURWOOD, on a former day, moved to set eside the verdict obtained by the plaintiff in this case, for irregularity. It was an action on a bill of exchange; and on the day after that on which the plaintiff ought to have entered the cause in the Marshal's book, for trial at the then ensuing sittings before the Lord Chief Justice, the defendant went to the Marshal's office and entered the cause to trial on such in the Marshal's book, and marked it with a ne recipiatur. On the same 'day, the plaintiff called at the Marshal's office, and finding upon the inspection of the Masshal's book, that the cause had been entered, went away. At the ensuing sittings the cause was called on, and tried as being undefended, and the plaintiff had a verdict. Under these circumstances, it was contended that the verdict was irregular, the cause not having been entered by the plaintiff.

> Comun now showed cause, and contended, that as the cause had been entered in the Marshal's book, by the defendant, the plaintiff had a right to try the cause, it having been regularly called on by the Marshal, in its order, although the plaintiff himself had made no entry in the Marshal's book.

# Curwood, contra, was stopped by the Court.

BAYLEY, J.—It is no answer to this application to say, that the defendant had entered the cause. Such an entry was not sufficient to authorise the plaintiff to try the cause, he not having himself entered it. It is every day's practice for the defendant, as well as the plaintiff, to enter the same cause; and then at the trial, it becomes a question which record shall be first called on. In this case, the plaintiff had not entered his record at all, and therefore he had no right to the present verdict.

The other Judges concurred.

Rule wheelute.

## The King v. Lacy, clerk.

ON appeal by the Rev. Richard Lacy, rector of the parish of Whiston, against an order made by a magistrate, for the payment of the sum of 121.5s., being the amount tithes payable of, a highway assessment upon him for the township of Whiston, the sessions confirmed the order, subject to the were aboopinion of this Court upon the following case.

In the 56 Geo. 3, an act was passed, intituled, "An Act for enclosing Lands in the Parish of Whiston, in the ascertain the County of York," in which act is the following clause:-"And whereas it is convenient and desirable that all and to affix a fair , singular the great tithes rendered or payable in kind or otherwise; and all ecclesiastical dues, moduses, compositions, or other payments in money, or prescriptive rights whatsoever in lieu thereof, which can or may henceforth arise or grow due or payable to the said Richard Lacu. and his successors, rectors of the parish of Whiston, aforesaid, for the time being; out of, or from, or for, and in respect of, as well the said several commons and parcels of the hands of waste ground, by this act directed to be divided, allotted, and enclosed, as the several and respective messuages, cottages, tofts, garths, gardens, orchards, and ancient inclosed lands and grounds, and other hereditaments, situate, lying and being within the said parish, shall be abolished and extinguished; and that in lieu thereof, within so much of the said parish as lies within the said manor of Whiston, an adequate compensation should be made to the said Richard Lacy, and his successors, rectors of the parish of Whiston, aforesaid, for the time being. by a corn rent or rents, as hereinafter mentioned, and that , in lieu thereof, within so much of the said parish as lies within the said manor of Morthen, an adequate compensation should be made to the said Richard Lacy, and his successors, by an allotment, or allotments of land, as hereinafter, mentioned: Be it therefore enacted, that the said

Thursday, 8th June.

By a private inclosure act, the great to the rector of a parish lished, and the commissioners were directed "to net value of the tithes, and clear annual rent per acre, in lieu of, and in compensation for, the tithes, to the rector:-Held, that such rent was rateable to the repair of the highways in the rector.

REX v. LACY. commissioners shall, and they are hereby required, to ascertain the net value of all great tithes and moduses issuing, or that may arise and renew from, out of, in, or upon, so much of the said commons and ancient inclosures of the said parish, as lie within the said manor of Whiston, with respect to each owner's or proprietor's share thereof; and to affix a fair clear annual rent or sum of money per acre, in lieu of such great tithes and moduses, and as an adequate compensation and satisfaction for the same, to the said Richard Lacy, and his successors, rectors of Whiston, aforesaid; and shall, in and by their award hereinafter directed to be made, ascertain and distinctly set forth against the name of each owner of common allotment, and ancient inclosures, at the time of making such their award, the exact measurement of each field or inclosure constituting his, her, or their property, within the manor of Whiston, aforesaid, and the annual rents or sums of money per acre, to be hereafter issuing from each field or inclosure respectively, in lieu of all great tithes and moduses, as aforesaid; which said rents and sums of money shall be payable and paid for ever by the several owners or occupiers thereof, by four equal quarterly payments in every year; that is to say, on the 12th day of February, the 12th day of May, the 12th day of August, and the 12th day of November; the first payment thereof to begin and be made on the 12th day of February, in such year as the said commissioners in their award shall order or direct." The rector was to have an allotment in lieu of small tithes. In the year 1825, the Rev. R. Lacy was rated for the repairs of the highways in the township of Whiston, at the sum of 121. 5s., in respect of the corn rents given to him in lieu of tithes. This he refused to pay; and upon such refusal, the order appealed against was made.

Tindal, in support of the order of sessions. The corn rents in this case are liable to the highway rates. The

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General Highway Act, 13 Geo. 3, c. 78, s. 45, directs the assessments to be made "upon every occupier of lands. tenements, woods, tithes, and hereditaments, within the parish, township, or place;" and the only question, therefore, is, whether this corn rent, being substituted for tithes, can be considered tithes, within the meaning of that statute. Now, it is given, in the words of the inclosure act, in lieu of "all and singular the great tithes payable in kind or otherwise, all ecclesiastical dues, moduses, compositions, or other payments in money." Unless, therefore, there are words expressly making it payable without any deduction in respect of rates, the corn rent stands in the place of the tithes, and is liable to all the burthens to which the tithes themselves were For this position there are many authorities; as Lowndes v. Horne (a), Rex v. Boldero (b). Rex v. Toms (c), the money was paid to the rector, "clear of all taxes, deductions, charges, and expenses, parochial, parliamentary, or otherwise whatsoever;" and in Chatfield v. Ruston (d), the corn rent was payable, "free and clear from all rates, taxes, and deductions whatsoever:" and the decision in both those cases turned upon the exemption. It will be urged that the provision for the commissioners to ascertain the net value of the tithes, and to affix a clear annual rent in lieu of them, implies an intention to exempt this corn rent from rates; but fairly considered, it does not go that length: the "net value" of the tithes, means, the amount of the tithes, minus the expenses incurred by the rector in collecting and realising them: and the "clear annual rent" means the amount of the rent as ascertained by and after the preceding calculation of the net amount of the tithes. Poor rates, and highway rates, are fluctuating charges, and it would be impossible to make an estimate of them,

<sup>(</sup>a) 2 W. Bl. 1252.

<sup>(</sup>c) 1 Doug. 401.

<sup>(</sup>b) Ante, vol. vi., 557. 4 B. & C., 467.

<sup>(</sup>d) Ante, vol. v., 675; 3 B. & -

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therefore, so as to ascertain the net value of the tithes, after allowing for those rates.

Blackburne, contra. First, a corn rent, like that now under consideration, is not rateable under the General Highway Act. 13 Geo. 3, c. 78. There is no analogy between poor rates and highway rates; the 13 Geo. 3, ci-78, differs from the 43 Eliz., c. 2, in its language, its spirit, and its object: and, therefore, no inference can with justice be drawn in support of the rate in this case, from the decisions in cases arising upon the latter statute. that statute, " rectors and vicars" are expressly named as persons liable to be rated to the relief of the poof, and with abundant propriety and reason. In early ages, when there was no legal provision for the maintenance of the poor, the clergy were under a moral and spiritual obligation to relieve them out of the profits of their livings; and it was just and natural, therefore, that the statute should make them hable to be rated in respect of the profits of their livings, by whatever means those profits accrued. By the common law, the general charge of repairing all highways lies on the occupiers of the lands in the parish wherein the highways are; that is, upon the persons who use the roads; and therefore, the 13 Geo. 3. c. 78, casts the burthen of repairing toads upon the same description of persons, namely, "the infrabitants and occupiers of lands, tenements, woods, fithes, and hereditaments, within the parish, township, or place;" and the statute work is accordingly directed to be done or computed for, in proportion to the value of the lands occupied, or to the number of teams kept and used. By the party rated. This distinction between the two statutes is particularly pointed out by Bayley, J., in his judgment in the case of Rex v. The Justices of Buckinghamshire (a). There, the question was, whether a rector who let his tithes by parol to the occupiers of the land, in respect of which

(a) Ante, vol. ii., 689. 1 B. & C. 485.

the tithes arose, and received a half-yearly composition in the nature of sent, could be treated as an occupier of tithes within the meaning of the General Highway Act, and rateable to the highways, in the parish; and though the Court did not think it necessary to decide the question there, the inglination of their opinion seems to have been that the rector was not rateable, and they discharged a rule for a mandamus to Justices to compel them to enforce the payment of the rate. So in Underhill v. Ellicombe (a), where the circumstances were of a similar kind, the court of Exchequer seem to have thought a parson liable to be rated. Here, the defendant is clearly not within the letter of the statute, for he is not an occupier of tithes; neither is he within the spirit of the statute, for the object was to charge occupiers, and occupiers only. Second, the corn sent in this case is expressly exempted from all rates by the Inclosure Act. The direction to secestain the act value of the tithes, and to affix a clear amend rent in lieu of them, amounts to such an exemption. The "net value," of the tithes may fairly be argued to mean their value after deducting the amount of rates; but even if that is doubful, a "clear annual rent" must mean an annual rent clear of, that is, free from, all rates or deductions of any kind; for a rent which is subject to rates. cannot be said to be clear. In a contract of so much importance between a rector and his parishioners, every word must be supposed to have some meaning; and unless the word clear is held to mean clear of all deductions, it must be treated as utterly senseless, and must be omitted in the reading of the act.

The case was argued at the Sittings in Banco after last term, when the Court took time for consideration. Judgment was now delivered by

BAYLEY, J.—The question in this case was, whether a corn rest payable under an inclosure act to the rector of

(a) 1 M Cleland & Younge, 450.

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### CASES IN THE KING'S BENCH,

REX v. LACY.

Whiston, in lieu of tithes, was liable to be assessed to a highway rate. Two objections were made to the rate. One, that the corn rent was, virtually if not expressly, exempted from all rates by the inclosure act, which directed the rent to be fixed according to the net value of the tithes, and to be a clear rent; by which expressions it. was contended was meant a rent free from rates: the other, that tithes, in the general sense of the word, that is, tithes not impropriate, or appropriations of tithes, were exempt from highway rates, and, therefore, that this corn rent, which was payable in lieu of tithes, must be exempt Upon the second point, it must be considered as settled, by the case of Rex v. Boldero (a), that a corn rent stands upon the same footing as the tithes for which it is substituted, and therefore, that if the tithes themselves would have been liable, the corn rent, unless specially exempted by the inclosure act, is liable also. Then, is the corn rent in this case specially exempted by the inclosure act? The parish of Whiston is situate within two manors, Whiston and Morthen, and the inclosure act extends to both. Part of the parish constitutes a distinct and separate township, and the rate extends to that township only. The act directs that the rector, being rector of the parish, shall have, out of the wastes of both manors, an allotment equivalent in value to all the small tithes and payments in lieu of small tithes within both the manors, regard being had to the amount of the small tithes payable out of the old inclosures and commons within each of the manors respectively. But the act contains no provision for exempting that allotment from the burthen of parochial rates, and it would, therefore, of course, be liable to it. The act then makes a provision in lieu of great tithes, and directs that compensation shall be made for those of Whiston manor by a corn rent, and for those of Morthen manor by an allotment; but it contains no clause exempting that allotment from the burthen of parochial rates, and it also

<sup>(</sup>a) Ante. vol. vi., 557. 4 B. & C., 467.

would, therefore, of course, be liable to it. The commissioners are directed to ascertain the net value of all the great tithes, in the manor of Whiston, with respect to each owner's share thereof, and to affix a fair, clear, annual rent per acre, in lieu of such great tithes; and the question is, what is to be understood as the meaning of the term, the "net value of the tithes." If by the word net, is meant the value after deducting, not only the expenses of collecting and getting in, but the amount of all parochial burthens, the corn rent is exempt; but if the word net refers only to the expenses of collecting and getting in, the corn rent remains liable to all such parochial burthens as the tithes would otherwise have to bear: and we are of opinion that the word must be understood in the latter limited sense only. The expenses of collecting and getting in are easy of calculation, and are always nearly the same; they can vary only according as the price of labour and the accidents of the season vary; but the parochial burthens are likely to vary in a much greater degree: and if it was intended to exempt the rector from them with reference to this corn rent, there seems no conceivable reason why he should not have been exempted from them with reference to his allotments also. Certainly, the probability is that he was intended to be wholly exempted, or wholly liable. Then does the highway act apply only to tithes impropriate and appropriations of tithes, or does it extend to tithes generally? The language of the 13 Geo. 3, c. 78, s. 45, and of the 43 Eliz., c. 2, is exceedingly different. In the former the assessment is upon every "occupier of lands, tenements, woods, tithes, and hereditaments within the parish;" by the latter, it is to be upon every "inhabitant, parson, and vicar, and other occupier of lands; houses, tithes impropriate, appropriations of tithes, coal mines, or saleable underwoods." The motive for specifically naming tithes impropriate and appropriations of tithes, there, was probably this; that all other descriptions of tithe, all tithes in the hands of the incumbent, had

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already been made chargeable by the words "parson and vicar," and the other specific descriptions of tithes were added, to comprehend such as should be in the hands of laymen, and which would, therefore, not come in under the words "parson and vicar:" the object of the legislature being to include all possible descriptions of tithes, in whatever hands they might be. In the highway act, the only word used is the generic term tithes, and that must at once comprehend within itself every species of tithes, unless there are other words in other parts of the act, shewing a clear intention to the contrary. But there are no such words; we can, therefore, presume no such intention, and that being the case, we are of opinion that this corn rent is in substance tithes, and as such liable to this rate. The order of sessions, therefore, must be confirmed.

Order of Sessions confirmed.

Saturday, 10th June.

HALL and another v. FULLER and others.

A customer drew upon his banker a check for 3l., and paid it away. The amount of the check was altered by the holder to 200l., in such a manner that no one in the ordinary course of business could have observed it, and presented, and the 200l. paid

A customer aw upon his nker a check ants to the use of the plaintiffs. Plea, non assumpsit, 31., and id it away. He amount of the London adjourned sittings after Hilary term, 1824, the plaintiffs obtained a verdict, damages, 1971., subject to the opinion of the Court upon the following case.

The plaintiffs are merchants in the city of London, an according yourse count with the defendants, as bankers. On the 25th or could have observed it, and presented, and one of the plaintiffs, for the loan of a check for 3l., stating

by the banker:—Held, that the banker was liable to the customer for 1971., the difference between the amount of the genuine and the altered check.

at the time that it was for a friend to send into the country, upon which Mr. Hall drew, and delivered to Mr. Hill, the check upon the defendants, using for that purpose one of the printed forms with which the defendants stipply their customers. The sum for which the checkwas drawn, was written by Mr. Hall in words at length in the body of the check, and also in figures; the latter being in the same line with his signature. Mr. Hill had been induced to apply for the loan of the check by one Wagstaffe, who had applied to him for such a check, and Mr. Hill having obtained it, handed it over to Wagstaffe. Wagstaffe expunged the dates, the figures, and the words "three pounds," and substituted the words " two hundred. pounds," and the figures, "2001.;" but in such a manner that no one in the ordinary course of business could have observed it. The check to altered, was presented by or on account of Wageloffe to the defendants for payment, on the 29th of August, on which day the belance in their hands on the account of the plaintiffs, was only 189%. 15s. 5d.: The defendents paid the amount of the check as aftered, and having a day or two afterwards received funds to cover the amount ever paid on the 29th of August, they claimed to retain the whole sam of 2001. on account of the check drawn and paid under the foregoing circumstances.

F. Pollock, for the plaintiffs. This action is maintainable, and for the whole amount of the check. Assuming, in the first instance, that the defendants had funds in their hands, belonging to the plaintiffs, adequate to the amount of the check, and that they were not guilty of any negligence, still they must bear the loss that has happened, because the check which they paid was not the check of the defendants, and therefore they have paid away the money of the plaintiffs without any authority for so doing. In principle this is like any other case of forgery. Suppose this had been the case of a check, the body of which was in the hand-writing of the plaintiffs, but their signature to

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This is a case of some novelty, Goulburn, contrà. and of vast importance to bankers, who, if the defendants are held liable, will be exposed to constant depredations, without the possibility of protection. If the signature of the drawer of a check is genuine, the banker is bound by law to pay it, though every other part of it may be written by another; therefore, surely, his ascertaining the genuineness of the signature is sufficient to justify and protect him in so paying, without further examination of the check. The argument that he ought to go further, and after ascertaining that the signature is genuine, should examine the check so closely as to detect any alteration in the body of it, however minute, and however nicely executed, seems most unreasonable, and would require a degree of labour and delay utterly inconsistent with the necessary dispatch HALL v. Fuller. HALL v. FULLER.

of thusiness. The assertion, that any alteration in a check or bill, made after it is originally drawn, renders it void, sis not correct to the extent assumed, and is not borne out by the decisions upon the subject. In Kershaw v. Cax (a), it was held by Lord Kenyon, that a very material alteration of a bill of exchange, by inserting in it the words "or order." did not render it void. [Bayley, J. There the alteration was made by the drawer, with the consent of the pavee, and for the purpose of correcting a mistake; and in (Knill) w. Williams (b), Le Blanc, J., said, that Kershaw v. Car, could only be supported on the ground vthat the alteration was merely the correction of a mistake, for the alteration was a very material one. That, therefore, is a very different case from the present]. It shows -that: the-mere fact of an alteration being made, does not -necessarily witiate, a bill or check. With respect to an salteration in the amount, Scacchia, as cited by Pothier in the passage already mentioned, is an express authority for usaying, that in a case like this, the loss must fall on the . drawer, and not on the banker; though Pothier, certainly, expresses himself of a different, opinion. The supposed analogy between deeds and bills was denied to exist by Buller, J., in his elaborate judgment in the case of Master .v..Miller (c); and it is quite clear that such an alteration ... of a .. deed, as .. was made of the bill in Kershaw v., Cox, would render a deed void. [Bayley, J. But the rest of the Court differed from Mr. Justice Buller, and their judgment was affirmed in the Exchequer Chamber, on error]. Scho-· ley.v.. Ramsbottom (d) is no authority against the present . defendants. There the bankers, were guilty of gross negli-. gence, for all the circumstances were such as to excite their suspicion. The check had been torn into four parts, and pasted together again, and was palpably defaced, and dirty, when it was presented for payment; and that was

<sup>(</sup>a) 3. Esp. 246.

<sup>(</sup>c) 4 T. R. 820.

<sup>(</sup>b) 10 East, 455. See 12 East, 475. 15 East, 417. 1 Ma & S, 217.

<sup>(</sup>d) 2 Camp. 485.

the ground of Lord Ellenborough's opinion. Here, there was nothing to excite suspicion, for surely the fact of an old : customer for once over-drawing his account a few pounds, was anot calculated to have that effect, and the case : finds : that the check was altered "in such a manner that no one in the ordinary course of business could have observed it." The negligence here was altogether on the side of the customer. To lend a sheek for so small a sum to one person, for the purpose of being lent again to:a third person, and by him sent into the country, was a most rash and impredent measure, and was a direct violation of the widerstood contract existing between a banker and his customers, namely, that the customer shall use direcaution in the shering his checks into the world, and shall apply them to the bona fide purpose of drawing out his own finds for his cown occasions. In principle, the present resembles the case of Russell v. Langstoffe. (a), where it was held, that an indorsement, written on a blank note or check, will afterwards bind the indorser for any sum; and

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own imprudence. So, here, the plaintiffs have lent their signature to a person to whom they owed nothing, who they knew would not present it himself, but would hand it over to a stranger; and have, therefore, acted with a degree of negligence and imprudence, which renders them responsible for all the consequences.

ABBOTT, C. J.—I am clearly of opinion that the plaintiffs are entitled to recover; and on this short ground. A banker has no right to charge his customer with any sum, which he has not expressly ordered him to pay. Here,

time of payment which the person, to whom he intrusts the note, chuses to insert in it. It was argued there, as it has been here, that the note, when so filled up, was not the note of the person who had signed it in blank; but the Court overruled the objection, and held, that the defendant was responsible for all the consequences of his HALL v. FULLER. unfortunately, the defendants have paid a larger sum than the plaintiffs had ordered them to pay; for the order was to pay 31., and they have paid 2001. I am decidedly of opinion that the defendants can charge the plaintiff the 31. only, and it follows that the plaintiffs are entitled to recover the excess, namely, 1971.

BAYLEY, J.—I am of the same opinion. A banker is the mere depository of his customer's money, and his duty is to pay it out from time to time in such amounts as the customer directs. If he, unfortunately, pays away his customer's money upon a forged order, he must abide the loss; for in order to justify him in paying at all, he must shew that the order is genuine in all its parts; not in the signature only, but throughout. Now, in this case, the banker has paid upon an order which was not genuine, for his customer never ordered the sum which he has paid, to be paid. The plaintiffs, therefore, are entitled to judgment.

The other Judges concurred.

Postea to the Plaintiffs.

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By lease and release of June, 1750, for the opinion of this Court.

mon recovery suffered in pursuance thereof, C. and H. R. settled certain freehold estates to such uses as C., H. R. and D. his wife, and M. R. should appoint, and in default of such appointment, as to part, to the use of C. for life, and as to the residue, to the use of H. R. in fee. By lease and release of October, 1751, the latter made between A. and B., of the first part; C., H. R. and D. his wife, and M. R., of the second part; and W. M., J. L., R. W., and P. W., of the third part; C., H. R. and D. his wife, and M. R. did grant, bargain, sell, release, confirm, direct, limit, and appoint, to W. M., J. L., R. W., and P. W., in their actual possession being, the same estates, to hold to them in fee, for several uses there set forth:—Held, that by those deeds the legal fee in the estates so settled, did not vest in W. M., J. L., R. W., and P. W.

By indentures of lease and release bearing date respectively 1st and 2d June, 1750; the release being tripartite, and made between Humphrey Roberts and Dorothy his wife, Mary Roberts, spinster, and heir apparent of the said Humphrey Roberts and Dorothy his wife, and Catherine Roberts, widow, of the first part; John Salnsbury and John Ellis, of the second part; and Robert Wynne and Owen Holland, of the third part; and by common recovery suffered in pursuance thereof at the great sessions for the county of Carnarvon, 8th September, 1750; certain messuages, lands, and hereditaments, the estate and inheritance of the said Humphrey Roberts, and certain other messuages, lands, and hereditaments, the estate and inheritance of the said Catherine Roberts, and certain other messuages, lands, hereditaments, and premises, therein described to have been theretofore purchased by the said Humphrey Roberts, and all other the messuages, lands, tenements, and hereditaments whatsoever of them the said Humphrey Roberts and Dorothy his wife, Mary Roberts, and Catherine Roberts, or any of them, in the parishes therein mentioned, and elsewhere, in the county of Carnarvon, with their appurtenances, were limited; To the use and behoof of such person and persons, and for such estate and estates, and subject to such provisoes, powers, limitations, trusts, conditions, and agreements, as the said Humphrey Roberts and Dorothy his wife, Mary Roberts, and Catherine Roberts, at any time or times thereafter, during the term of their natural lives, by any their joint deed or deeds, writing or writings, to be by them duly executed in the presence of two or more credible witnesses, should direct, limit, and appoint; and for default of such direction, limitation, or appointment; To the use and behoof of such person or persons, for such estate and estates, and subject to such provisoes, powers, limitations, and agreements, as the said Humphrey Roberts and Dorothy his wife, and Mary Roberts, (in case they should all of them survive the said Cathe-

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their heirs, during the lives of the said Robert Wynne, the younger, and the said Mary his intended wife, respectively; in trust to preserve contingent remainders; and from and immediately after the decease of the survivor or longest liver of them the said Robert Wynne the younger, and Mary his intended wife; to the use and behoof of the said William Mostyn, John Lloyd, Robert Wunne (of Garthwin), and Pierce Wynne, their executors. administrators, and assigns, for the term of 500 years from thence next ensuing; nevertheless, upon the trusts, and for the intents and purposes thereinafter mentioned; and from and after, the determination of the said term and estate of and for 500 years; to the use of the first son of the said Robert Wynne the younger, by the said Mary his. intended wife, lawfully to be begotten, and the heirs of the body of such first son lawfully issuing; and for default of such issue, to the use of the second and every other son of the said Robert Wynne the younger, by the said Mary his intended wife, lawfully to be begotten, severally and successively, in tail; with remainder, to the use of the daughters of the said Robert Wynne the younger, by the said Mary his wife, in tail; with remainder, to the use of the said Humphrey Roberts, his heirs and assigns for ever. And it was thereby declared and agreed, that as well as to the said term of 500 years, as also as to another term of 500 years thereby created and limited, upon trust that in case there should be one or more younger child or children, sons or daughters, of the said Robert Wynne the younger, by the said Mary his intended wife, lawfully begotten, other than and besides such as should be immediately inheritable to the said premises, respectively, by virtue of the limitations thereinbefore contained; that then the said William Mostyn, John Lloyd, Robert Wynne (of Garthmin), and Pierce Wynne, and the survivor of them, and the executors and administrators of such survivor, should by sale or mortgage of the said terms, or any part thereof, or out of the

rents, issues, and profits, of the said premises during the said term, after the death of the said Robert Wunne the younger, or in his lifetime, if he should signify his consent thereto, as therein mentioned, (so as that thereby none of the prior estates in any part of the said premises, thereinbefore limited, should be thereby impeached or incumbered during the respective continuances thereof), raise and levy such sum and sums of money, not exceeding 6,000l., as the said Robert Wynne the younger, by any writing or writings under his hand and seal, attested by two or more credible witnesses, or by his last will and testament to be by him duly published in the presence of three or more credible witnesses, should direct or appoint; and for want of such direction or appointment, then to raise or levy the whole 6,0001., in manner following, that is to say; one moiety thereof out of the premises thereby granted and released by the said Robert Wynne, the elder, and Robert Wynne the younger, and the other moiety thereof out of the premises thereby granted and released by the said Humphrey Roberts and Dorothy his wife, Mary Roberts, and Catherine Roberts; and pay the same to and for the portion and portions of such younger child or children as therein mentioned. And it was by the same indenture provided, declared, and agreed, that if the said sum of 6,000l., or such part thereof as the said Robert Wynne the younger should so direct to be raised, should be paid by the person or persons who should be entitled to the freehold and inheritance of the said premises for the time being; then and from thenceforth, the said two several terms of 500 years and 500 years should cease, determine, and be utterly void. And by the same indenture of 2nd October, 1751, the said Humphrey Roberts, for himself and the said Dorothy his wife, and the said Mary Roberts and Catherine Roberts. for themselves, did, severally and respectively, and for their several and respective heirs, executors, and administrators. and not the one for the other, or the acts, deeds, heirs, &c.,

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of the other of them, covenant, promise and agree to and with the said William Mostyn, John Lloyd, Robert Wynne (of Garthwin), and Pierce Wynne, their executors and administrators, that they the said Humphrey Roberts, Dorothy his wife, Mary Roberts and Catherine Roberts, were, or one of them was, at and immediately before the sealing and delivery of the same indenture, lawfully, rightfully, and absolutely seised of and in all and singular the messuages, lands, tenements, and hereditaments by them thereby granted and released, or intended to be granted or released, for a good, sure, absolute and indefeasible estate of inheritance, and then had, or one of them had, in themselves, or himself, full power, lawful and absolute authority to grant, bargain, sell, convey, release and settle the same premises to and for the uses, intents and purposes, and in manner thereinbefore mentioned touching and concerning the same; and that all the same premises then were, and so from thenceforth should remain and continue free and clear, or otherwise by them the said Humphrey Roberts and Dorothy his wife, Mary Roberts and Catherine Roberts, their heirs, executors, administrators and assigns, or some of them, well and sufficiently saved, kept harmless and indemnified of, from, and against all and all manner of former and other gifts, grants, estates, tithes, troubles, charges, and incumbrances whatsoever, had, made, done, committed, or wittingly or willingly suffered by them the said Humphrey Roberts and Dorothy his wife, Mary Roberts and Catherine Roberts, or by, through, with, or under their act or acts, means, consent, neglect, default, privity or procurement. And further, that they the said Humphrey Roberts and Dorothy his wife, Mary Roberts and Catherine Roberts, and their respective heirs, and all and every other person or persons whatsoever having, or lawfully claiming, any estate or interest of, in, to, or out of, the same premises or any part thereof, from, by, or under them or any of them, should and would, from time to time, and at all times thereafter,

at or upon the reasonable request of the said William Mostyn, John Lloyd, Robert Wynne (of Garthwin), and Pierce Wynne, their heirs, and assigns, at the proper costs and charges of the said Humphrey Roberts, his heirs or assigns, make, do, acknowledge, levy, execute and suffer, or cause to be made, done, acknowledged, levied, executed and suffered, all and every such further and other act and acts, thing and things, assurances and conveyances in the law whatsoever, for the further, better, and more perfect assuring, settling and confirming of all and singular the said premises thereinbefore mentioned, or thereby intended or agreed to be by them released, settled or assured, or any part thereof, to the uses, intents and purposes thereinbefore expressed and declared concerning the same respectively, as by the said William Mostyn, John Lloyd, Robert Wynne (of Garthwin), and Pierce Wynne, their heirs or assigns, or their, or any of their counsel learned in the law, should be reasonably devised, advised, or required; and which said indenture of 2nd October, 1751, was duly executed by the said Robert Wynne the elder, and his execution thereof attested by two witnesses, and was duly executed by the said Robert Wunne the younger, and his execution thereof attested by three witnesses, and was also duly executed by the said Humphrey Roberts, Dorothy Roberts, Mary Roberts, and Catherine Roberts, and their respective execution thereof attested by three witnesses.

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The marriage between the said Robert Wynne the younger and the said Mary Roberts, was solemnized shortly after the execution of the said last mentioned indenture, and there was issue of the marriage only one son, Robert Watkin Wynne, and one daughter, Jane, who afterwards became the wife of John Wynne Griffith.

The said Catherine Roberts died in the year 1763, the said Humphrey Roberts died in the year 17—, and the said Dorothy Roberts died in the year 1767.

The said Robert Wynne the younger died in the year

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1782, leaving the said Mary his wife, and the said Robert Watkin Wynne, his only son and heir at law, and the said Jane, his daughter and only other child, him surviving; and having by his will, dated 24th September, 1767, directed that the whole of the said portion of 6,000l. should be raised in favour of his said daughter Jane, and paid to her on her attaining the age of 21 years, as therein mentioned. An indenture of settlement was made on the marriage of the said Jane with the said John Wynne Griffith, dated 15th February, 1785, whereby the said Jane assigned the said portion of 6,0001. to the said Robert Watkin Wynne, and John Lloyd, Robert Wynne, and Bennett Williams, esquires; upon trust to pay 1,000l. (part thereof) to the said John Wynne Griffith, and on receipt of the sum of 5,000l. (the residue thereof), to invest the same in the purchase of lands of inheritance, and settle the same in strict settlement for the benefit of the said John Wunne Griffith and Jane his wife, and their issue, as therein mentioned: but the settlement did not expressly authorise the said trustees to give discharges for the money.

By indentures of 4th and 5th October, 1805, the said Robert Watkin Wynne conveyed an estate called Plasnewydd estate) being part of the settled estates, to the use of the said John Wynne Griffith, Robert Watkin Wynne, and Edward Lloyd, upon trust to sell, and out of the monies to arise thereby to pay off the remainder of the portion of 6,000l.

By an indenture dated 24th December, 1812, after reciting that the sum of 4,200L, the then remainder of the said portion, had been paid off to the said John Lloyd (the surviving trustee of the said marriage settlement of the said John Wynne Griffith and Jane his wife), they the said John Lloyd, John Wynne Griffith, and Jane his wife, released the said John Wynne Griffith, Robert Watkin Wynne and Edward Lloyd, and the estate comprised in the said indenture of settlement of 1st and 2d October, 1751, of and from the same.

The said Robert Watkin Wynne died in the year 1806, in the lifetime of his said mother Mary Wynne, and without having barred the said entail, leaving John Wynne, his eldest son and heir at law, him surviving. The said Mary Wynne died in the month of January, 1814.

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By indentures of lease and release, bearing date respectively 10th and 11th March, 1814, and made and duly executed between the said John Wynne, therein described as the eldest son and heir at law of the said. Robert Watkin Wynne, who was the only son of the said Robert Wynne by Mary his late wife deceased, of the first part; John Oldfield of the second part; and Sir Thomas Mostun, baronet, of the third part; thereby, after reciting (among other things) the said indentures of 1st and 2nd October, 1751, and that the said Robert Watkin Wynne died in 1806 without having done any act to bar the estate tail vested in him in remainder under the said last mentioned indenture; it is witnessed, that the said John Wynne, for barring and destroying the estate tail then vested in him of and in all the messuages, lands and hereditaments therein mentioned, and for assuring the same to the uses limited and declared of and concerning the same, did grant, release, and confirm unto the said John Oldfield and his heirs, the said settled estates in the county of Carnarvon; to hold the same unto and to the use of the said John Oldfield, his heirs and assigns for ever; to the intent that the said John Oldfield might be tenant to the precipe in a common recovery to be suffered of the same premises, and which said recovery, when suffered, it was thereby declared should enure; to the use of such person or persons, and for such estate or estates, as the said John Wynne should in manner therein mentioned appoint; and in default thereof, to the use of the said John Wynne and his assigns for his life, without impeachment of waste, with remainder, to the use of the said Sir Thomas Mostyn and his heirs, during the natural life of the said John Wynne, in trust for him the said John

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Wynne; with remainder; to the use of the right heirs of the said John Wynne, for ever; and which said recovery was afterwards duly had and suffered at the Carnarvon-shire Great Sessions, 4th April, 1814.

By a decretal order of the High Court of Chancery, made 5th August, 1822, in a cause in which the said John Wynne was plaintiff, and the said John Wynne Griffith and others were defendants; it was declared, that the said portion of 6,000l. had been fully paid and satisfied, and the said term of 500 years had ceased and determined.

The question for the opinion of this Court was, whether, under the said indentures of 1st and 2d June, 1750, and the common recovery suffered in pursuance thereof; and under the said indentures of 1st and 2d October, 1751, the legal fee of such of the estates and premises comprised in the said first mentioned indentures, as were settled and assured by the said last mentioned indentures, became vested in the said William Mostyn, John Lloyd, Robert Wynne (of Garthwin), and Pierce Wynne: And, if so, whether a jury would be directed to presume a reconveyance of the said legal estate from them to the uses specified in that deed.

Preston, for the plaintiff. The deeds of the 1st and 2d of October, 1751, operated as a conveyance under the seisin of Humphrey Roberts and Catherine Roberts, and not as an appointment under the power. The deeds of 1750 shew that the entire seisin was, at that time, in Humphrey Roberts and Dorothy his wife. They, therefore, might have conveyed by common law assurance, without regard to the power; and if they had done so, that would have extinguished the power. The power was one in the nature of an ownership, and capable of being released: it was not a mere naked authority. If either of the four grantors had done any act to extinguish the power, the operation of the power would have been destroyed protanto, for such powers are apportionable, and may be-

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released in part, though not all at once. Albany's case (a), Digges's case (b). Any one of the parties, therefore, might have put an end to the ownership, and Mr. and Mrs. Roberts, together, might have extinguished the power.— [Bayley, J.—The owner of the fee must have been a party to the exercise of the power]. Certainly; and he could not do an act by virtue of the power, in defeazance of another act done immediately before by himself, as owner. Then, as it was competent either to the four to exercise their power, and put an end to the ownership, or to the two to exercise their ownership, and put an end to the power; the question to day is, what is the effect of the acts they have done, consistently with the rules of law. Now, the rules of law upon the subject, are clearly expressed in Sir Edward Clere's case (c). "If a man seised of land in fee makes a feoffment to the use of such person or persons, and of such estate and estates as he shall appoint by his will, that by operation of law, the use doth rest in the feoffor, and he is seised of a qualified fee, that is to say, till declaration and limitation be made according to his power. When a man makes a feofiment to the use of his last will, he has the use in the mean time. such case, the feoffor, by his will, limits estates according to his power, reserved to him on the feoffment, there the estates shall take effect by force of the feoffment, and the use is directed by the will; so that in such case the will is but declaratory: but if, in such case, the feoffor, by his will in writing, devises the land itself, as owner of the land, without any reference to his authority, there it shall pass by the will, for the testator had an estate devisable in him, and power also to limit an use, and he had election to pursue which of them he would; and when he devised the land itself without any reference to his authority or power, he declared his intent to devise an estate as owner of the land by his will, and not to limit an use according

<sup>(</sup>a) 1 Rep. 110 b. . .

<sup>(</sup>c) 6 Id. 17 b.

<sup>(</sup>b) Id. 173 a.

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to his authority; and in such case, the land being held in capite, the devise is good for two parts, and void for the third part, for, as the owner of the land, he cannot dispose of more; and, in such case, the devise cannot take effect by the will for two parts, and by the feoffment for the third part; for he made his devise as owner, and not according to his authority, and his devise shall be of as much validity as the will of every other owner having any land in capite." It is a general rule, that effect is, if possible, to be given to the acts of a party; Treport's case (a). There A. was tenant for life, the remainder to B. in fee, and they both by indenture joined in a lease to the plaintiff; and it was resolved, that presently, by the delivery of the deed, it was the lease of A., during his life, and the confirmation of B.; and after the death of A., it was the lease of B., and the confirmation of A. Roe v. Tranmer (b), is to the same effect; where it was held, that the deed could not operate as a release, because it attempted to convey a freehold in futuro, but that it was good as a covenant to stand seised. There is also another rule of law important to be remembered as bearing upon this case, namely, that the grantee of a deed is entitled to plead the deed in any mode most conducive to his own interest. so that it be not contrary to the apparent intent of the Heyward's case (c), Darrel v. Gunter (d). Then look to the form of the instrument in question. some cases the deed is such, that it may operate in part over the ownership, and in part over the power; but this is not such a case: here the deed must operate in toto. either as an appointment, or as a conveyance. It could not be pleaded as both. The party would be bound to plead it as one or the other, and by so doing would make his election to take it as an appointment, or as a conveyance; an election which the grantee would have, which-

<sup>(</sup>a) 6 Rep. 14 b. (d) Sir W. Jones, 206; 2 Roll.

<sup>(</sup>b) Willes, 682; 2 Wilson, 75. Abr. 787, pl. 7.

<sup>(</sup>c) 2 Rep. 35.

ever way the grantor intended the deed to operate. quite clear, from the form of the deed, that the parties intended it to operate as a common law conveyance, for else, to what purpose, or of what utility was the lease for a year, except it was to be followed by the release? that was the design, its introduction was a perfect anomaly. The lease for a year pro tanto suspended the power. The intent of the parties was to convey to uses capable of execution by the statute. Except in the very words of grant only, there is no part of the deed in which any reference is made to the power, and there it is quite evident that the words "direct, limit, and appoint," have crept in through mistake. Those words can have no operation in point of law, but they may have the effect of expressing the concurrence of the parties who had no interest in the estate, and whose interest, if they had any, would have been bound thereby. All the different parts of the deed shew that the parties were acting by virtue of their ownership, and not by virtue of their power. The first use in the settlement is to secure the estate, until the marriage, to the same uses as before the settlement was made. Suppose the marriage had never taken place, would it have been possible to convince the parties that their previous powers were gone, and that the legal estate had vested in the trustees? Clearly not; nor would any such result have ensued: for if the marriage had not taken place, the parties would have been in statu quo. It was never intended to vest the legal estate in the trustees. Their duties were merely nominal; or at least, the only important duty was that relating to the term of 500 years. Now that was clearly a legal, and not an equitable term. The proper construction of a deed, is that which will give it complete legal effect. The construction now contended for will have that operation, and no other mode of construction will. Suppose this particular case had occurred previous to the passing of the Statute of Uses,—how would the law have stood then? The Court then could only have looked at the power as an

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equitable power, and have considered the case as within the second resolution in Sir Edward Clere's case (a), where the act of the testator was held to take effect out of the interest, and not out of the power, and within the rule laid down in Parker v. Kett (b), and recognised by Lord Kenyon, when Master of the Rolls, in Andrews v. Emmett (c), namely, "that where one has an interest, and an authority together, and he does an act generally, it shall be construed in relation to his interest, and not to his authority." None of these parties are interested in contending that this deed operated as an appointment; and no part of the deed itself indicates the intention of the parties to have been that the legal estate should vest in the trustees for any purpose: then the case of Cox v. Chamberlain (d) applies. There the rule of construction was laid down to be, that an instrument like the present is to be construed either as an appointment, or a conveyance. as will best give effect to the real object and intention of the parties. It was there held, that where "A. having both a power and an interest, the estate being conveyed to such uses as he should appoint, and in default of appointment, to him in fee, conveys by lease and release, using also words of appointment; the deed operates as a conveyance of his interest, not as an execution of his power; especially if the effect of the latter construction will defeat the object;" and the Master of the Rolls, in his judgment, said, "I am clearly of opinion, upon every principle upon which the Court acts with regard to the construction of conveyances, that it would be monstrous in this case to hold, that where there is a power and an interest, and the act being equivocal, it is doubtful whether he acted under the one or the other, the Court should adopt that which would defeat the instrument." Now that case is extremely similar to the present, and is a strong authority in favour

<sup>(</sup>a) 6 Rep. 17 b.

East, 108, 298-9.

<sup>(</sup>b) 12 Mod. 469.

<sup>(</sup>d) 4 Vesey, jun. 631.

<sup>(</sup>c) 2 Bro. C. C. 300. See 6

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of the present argument. It will perhaps be suggested that that case has been over-ruled, or impugned by the subsequent case of Roach v. Wadham (a); but the latter in reality supports the former, and assists the present argument; for though there were words of appointment as well as of conveyance there, and it was held that the purchaser took by appointment, and not by conveyance, it was because the instrument, though more commonly and properly adapted to pass an interest, and containing words of grant for that purpose, yet professed in terms to be an appointment; and because it was obviously for the benefit of the purchaser to take by appointment, and such appeared upon the whole to have been the intention of the parties. Goodill v. Brigham (b), will be relied on by the other side, but it is perfectly reconcileable with all the other cases on the subject; for all that was there decided was, that under a devise to a feme covert, with a power to dispose of the estate without the control of her husband, the power was void, as being inconsistent with the fee given to her in the first instance, and that she could not convey without fine. That decision was founded on the rule of common law, by which a fee and a power cannot exist together in the same person; but that rule does not apply to cases under the Statute of Uses, and when that distinction is remembered, it reconciles Goodill v. Brigham (b) with Cox v. Chamberlain (c). If Roach v. Wadham (d) was decided upon the ground of effectuating the intention of the parties, it presents no difficulty, and leaves Cox v. Chamberlain (e) untouched as an authority in favour of the present plaintiff; and if it was decided upon any other ground, it is directly opposed to the rule of law as laid down both there and in Sir Edward Clere's case (f). That it was decided upon that ground only, seems manifest from the language used by

<sup>(</sup>a) 6 East, 289.

<sup>(</sup>d) 6 East, 289.

<sup>(</sup>b) 1 Bos. & Pul. 192.

<sup>(</sup>e) 4 Vesey, 631.

<sup>(</sup>c) 4 Vesey, jun. 641.

<sup>(</sup>f) 6 Rep. 17 b.

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Lord Ellenborough, in the preliminary part of his judgment; for he said, "this is a conveyance with a double aspect, having words which indicate an intention to pass an interest and to limit an use, and to be taken either as a conveyance or an appointment. We will, therefore, look into the deeds and see which is the predominant intention." Then, to return to the deed in question, it must be taken to operate either as a conveyance, or an appointment. If it operates both ways, it is inconsistent and repugnant. If the words, "direct, limit, and appoint," are to make it operate as an appointment, it can only be by rejecting the words of grant altogether, which will be to do away the legal rights of the parties, to render all the uses inoperative as legal uses, and to make one half of the deed entirely nugatory. But a Court of common law will not so construe a deed as to produce such consequences: they will, if possible, give the instrument that operation and validity which the common law would give it; and will consequently, reject the words of appointment, and effectuate the manifest intention of the parties, by holding that this deed is a conveyance, and not an appointment. But, secondly, even if the Court should be of opinion that the deed operated by way of appointment, and so vested the legal estate in the trustees; still they will, under all the circumstances of the case, presume a re-conveyance of it. [Bayley, J. How can we, as a Court of law, presume any such thing? It is a question of presumption of fact for a jury, and not of law for a Court. I apprehend, that even at Nisi Prius, all that a Judge would be authorised to do, would be to leave it to the jury to say, whether they could presume a re-conveyance or not; he would not be authorised to act upon his own opinion, and direct the jury in point of law to presume it: nor would a bill of exceptions lie for his refusing so to direct them]. In Bartlett v. Downes (a), in this Court, it was held to have been properly left to the jury to presume the surrender of a term.

<sup>(</sup>a) Ante, vol. v., 526. 3 B. & C.

[Bayley, J. No doubt that it was competent to the Judge to leave it to the jury to say whether they would or would not presume it, and that upon the evidence before them, the jury had not acted unreasonably in presuming it. But that is a very different case from this. You are proposing to argue, that we, as a Court of law, may presume a re-conveyance of an estate. It is impossible that we, consistently with our duty, can hear any such point argued. It is a question for a jury, and not for us; and we should be infringing upon the province of the jury, if we were to entertain it for a moment].

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Coote, contrà. The question in this case is not, whether the deed can be supported only as a conveyance, or can be supported only as an appointment; for there is no doubt that it may be supported as both: but the question is, as which of the two it was the real and predominant intention of the parties that the deed should operate. This is a mere question of intention; and it is submitted on the part of the defendant, to have been clearly the predominant intention of the parties at the time when they executed this deed, that it should take effect, not as a conveyance, but as an appointment. Now the question, what was the intention of particular persons, in doing a particular act, at a particular time, is twofold. It divides itself into these two branches: first, what was their intention as to the mode of effecting their object; and second, what was their intention as to the object to be effected. The material branch of the question in this case is the first, and the real inquiry before the Court is, what mode these parties intended to adopt for the purpose of effecting the object they had in view. If the Court can satisfy themselves upon that point, independently of the other, they will go no further; if they cannot, they will go on, and inquire what was the object the parties intended to effect. Now, looking at the case, and the facts of it, thus simplified and shortened, there is not the slightest doubt or difficulty

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connected with it. In the year 1751, when the deed was executed, the state of the title to the estates was this. Catherine Roberts had a life interest in a very trifling Dorothy Roberts had a mere right of dower. Mary Roberts had no interest at all. Humphrey Roberts had the fee simple. Under these circumstances they all join in the execution of the deed, which was totally unnecessary if they intended it to operate as a conveyance of an interest, and not as an appointment in execution of a power. But the Court are required to-day to say, that it was not the intention of these parties to execute the power; the effect of which will be to stultify the acts of two of them at least, Dorothy and Mary Roberts. Mary had no interest at all in the premises, then with what other possible intention could she execute the deed? The power is referred to in other parts of the deed besides the granting part. The rule in Sir Edward Clere's case (a), is not so generally applicable as has been contended; Roach v Wadham (b), was decided upon the principle, that in ascertaining the predominant intention of the parties, the mode which they adopted for effecting their object, was principally to be looked at; and Cox v. Chamberlain (c) is not at all inconsistent with that, because there the Master of the Rolls proceeded upon the ground that the act of the party was equivocal, and he does not say that he should have formed the same opinion if the act had been unequivocal. Boughton v. Sandilands (d), is another authority to shew that the intention of the parties in cases of this kind, is to be collected from the mode in which they set about their object, and not from the object There, a lady having actually married with the consent of guardians named by her deceased supposed putative father, and confirmed by the court of Chancery, she suffered a recovery, and declared the uses to the joint appointment of herself and her husband, with remainder

<sup>(</sup>a) 6 Rep. 17 b.

<sup>(</sup>c) 4 Vesey, 631.

<sup>(</sup>b) 6 East, 289.

<sup>(</sup>d) 3 Taunt. 342.

in strict settlement. It being discovered that her supposed marriage was void, because at the time thereof her legal father was alive, and did not consent to the marriage; the parties conceived that the settlement and recovery were void, and executed a deed of revocation, and suffered another recovery, after which the lady made a new settlement: and the Court held that the first recovery and settlement were valid, although made under a mistake of the situation in which the parties stood. But, even if the predominant intention of the parties is not otherwise made apparent, it certainly is so from this construction of the deed. Under the deed of 1750, Humphrey Roberts was seised in fee; and if the deed of 1751 is construed in any other way than that now contended for, the settlement which was intended to be made is imperfect, for then Dorothy Roberts' right of dower would not be barred.

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Preston, in reply. The intention of the parties seems to be admitted on both sides as clear; but it is contended, on the part of the defendant, that because, in giving effect to that intention they have committed a blunder, the Court is to take hold of that blunder, to defeat the real effect of their acts. That the Court certainly will not do. Boughton v. Sandilands (a), has no application to this case; the decision there proceeded entirely upon the ground of fraud: and there is no imputation of fraud This deed may operate as a conveyance by the parties having an interest; and as a confirmation by the parties who had no interest; the words "ratify and confirm" are not necessary to give a deed that operation, Treport's case (b): and it is not necessary that the party confirming should have any estate, because the confirmation is only to guard against any possible estate hereafter. As to the right of dower, if it is said, that by construing this deed as a conveyance, Dorothy Roberts would still preserve her right of dower; the answer is, that the

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appointment is used in that construction, for the purpose of defeating her right of dower. This becomes evident, by simply dividing the clause in the deed into two parts: and then the first is a conveyance, to pass the seisin; and the second is an appointment, to operate by way of release or Mr. Coote I understand to extinguishment. [Bayley, J. put this point thus:--" Something must pass; by the appointment; and if the appointment operates by way of extinguishment of the power, then the right of dower arises"]. No doubt that is the argument; and the short answer to it is, that the title to dower springs up with the new seisin, which Dorothy Roberts, the person supposed to be dowable, confirms the conveyance of to another party. [Bayley, J. May not the words of the deed be construed distributively, referring the words of appointment to the limitation of the uses? Supposing Catherine Roberts and Humphrey Roberts to grant, bargain, and release to the releasees all the property, and the four who have the power, to direct, limit, and appoint, to the uses thereinafter mentioned; and reading the deed in that manner, would not operation be given to all the words? The deed does not profess to grant to the use of the releasees; nor is there a single use declared in their favour]. That is, undoubtedly, the proper mode of reading the deed; and by so doing, effect will be given to all its parts, and the intention of the parties will be carried into effect. Such a mode of construction is suggested in a note to Co. Litt., 271 b; and removes the whole difficulty in this case.

The case was argued at the sittings in Banco, before last Hilary term. The following certificate was afterwards sent by this Court to the Master of the Rolls:—

"This case has been argued before us by Counsel; and we are of opinion that, under the said indentures of 1st and 2nd June, 1750, and the common recovery suffered in pursuance thereof; and under the said indentures of 1st and 2nd October, 1751, the legal fee of such of the estates and pre-

mises comprised in the said first-mentioned indentures, as were settled and assured by the said last-mentioned indentures, did not vest in the said William Mostyn, John Lloyd, Robert Wynne of (Garthwin), and Pierce Wynne.

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J. BAYLEY. G. S. HOLROYD. J. LITTLEDALE."

#### TOMLINSON v. BENTALL.

ASSUMPSIT for work and labour bestowed by the plaintiff, as a surgeon and apothecary, in and about the cure of one Phabe Bannister. Plea, the general issue. trial before Graham, B., at the last Lent assizes for the county of Essex, the case was thus:—The plaintiff was a surgeon and apothecary, carrying on business in the borough of Maldon; and at the time of the transaction in question, the defendants were overseers of the poor of the adjoining parish of Heybridge. About 11 o'clock on a night in October, 1824, a poor woman named Phabe Bannister, was A., the overreturning in a cart from Witham fair, through Heybridge, to the parish of St. Mary, Maldon, to which parish she When the cart arrived opposite the Hoy public-house in Heybridge, which was only 40 yards from the parish of St. Mary, Maldon, it was upset, and the poor woman being thrown out, had one of her thighs broken, and was otherwise seriously injured. In this situation, the driver of the cart sent for the constable of the parish, to consult with him what was to be done with the The constable ordered her to be sent out of Heybridge, and she was accordingly again placed in the cart, and taken over a bridge which divided the two parishes of Heybridge and St. Mary. The driver of the

Saturday, 10th June.

A pauper met with an accident in the parish of A., and was wrongfully removed [but with her own consent to the parish of B. to which she belonged :-Held that being casual poor in seers of that parish were liable (without an express promise) to pay the expense of her cure in the parish of B.

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cart having remonstrated with the constable, in removing the poor woman in that state, she was taken by his directions back to Heybridge. The constable then went to a neighbouring magistrate, who was also churchwarden of Heybridge, and the magistrate being informed of the circumstances of the case, immediately ordered the woman to be taken to the nearest public-house, a surgeon to be sent for, and every care to be taken of her. She was then carried to the Hoy public-house, but the landlord refused to take her in, saying, that he had no convenient accommodations for a person in her situation. The driver of the cart then recommended that she should be taken to the poor-house. The constable said, that the poor-house being full, he did not know where they would put her. In this dilemma the pauper herself said, "then if you do not know where to put me, carry me to my own house, where I shall be better taken care of." At this time she was in extreme bodily distress, and had been some hours exposed to the night air. The constable then desired her to be taken to her own house, and she was accordingly taken, and arrived there about two in the morning. She then desired to be attended by the apothecary of the parish of Heybridge. The constable applied to the apothecary of Heybridge, to attend her; but he being informed that she was at her own house, declined going there, on the ground that she did not belong to his parish. . The constable then sent for the plaintiff, Tomlinson, who was parish-surgeon and apothecary of St. Mary, Maldon, and he attended her for several weeks; and having effected acure, brought this action against the defendants as overseers of Heybridge. Under these circumstances, it was objected on the part of the defendants, that in the absence of an express promise, this action could not be maintained against them; and that, supposing them to be liable on an implied promise, it was not binding, inasmuch as the relief was given to the pauper in her own parish, and not in Heybridge, where the accident happened. The learned Judge was of opinion, that there was some evidence to go to the jury, of an express promise to pay for the expense attending the cure of the pauper, inasmuch as the magistrate, who was also the churchwarden, gave directions that she should be taken care of; and there was the further fact, that the constable had sent for the plaintiff, and directed him to do what was proper for the pauper. But assuming there to be no evidence of an express promise, yet as casual poor, the woman was entitled to be immediately relieved by the parish officers, and this responsibility could not be shifted by wrongfully removing her to another parish. The jury, therefore, under the learned Judge's directions, found for the plaintiff.

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Nolan, in Easter term, obtained a rule nisi for a new trial, on the grounds taken at the assizes.

- Gurney and Chitty now shewed cause. First, there was sufficient evidence from which an express promise to pay the expense of curing the pauper might be presumed, and that evidence having been left to the jury, and a verdict found by them in the plaintiff's favour, there is no ground for granting a new trial. But, secondly, there was an imperative duty imposed upon the defendants to provide for the poor woman as casual poor, and they could not relieve themselves from that liability by sending her into the adioining parish. Suppose she had been carried to the nearest house in Heybridge, is there any doubt that the defendants would have been liable to the expense of her medical attendance and cure? A moral, as well as a legal obligation was cast upon the defendants to provide for the relief of the panper, under the circumstances proved. The fact of the pauper herself having desired to be taken home, in the extremity of her sufferings, can make no difference in the case; because there was a continuing liability on the part of the defendants to relieve the pauper wherever she was carried, the accident having happened in

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their parish. In Lamb v. Bunce (a), Lord Ellenborough said, "that the pauper was to be considered as casual poor, wherever his infirm and indigent body was found; and he had a claim on the parish where he was so found, to have his necessities provided for by them;" and he added, "it cannot be matter of dispute in point of law, and I could wish it were so understood, that where time is not afforded for procuring an order of justices, the law raises an obligation against the parish where the pauper lies sick as casual poor, to look to the supply of his necessities." In this case there being a clear legal obligation on the part of the defendants, to relieve this woman, as casual poor, that liability has not been discharged, even though she was carried out of the parish at her own request.

Nolan, contrà. This being an action against the overseers of the parish, they are not liable without some evidence of an express promise to pay the plaintiff his demand. There is no evidence of any privity or concurrence on their part in the act of the constable. The magistrate. or the constable, may have made themselves personally. liable; but it is incompetent to them by any act or direcrion of theirs, to impose a liability of this kind upon the parish officers. It is a very serious question, whether. under circumstances like the present, it is in the power of the parish constable, without the concurrence or control of the overseers, against whom the action is brought, to make them liable by any unauthorised act on his part. Admitting that the overseers are bound to provide for casual poor, from what does that obligation arise? arises, as was decided in Lamb v. Bunce, from the pauper being and continuing in the parish where the accident happens, and where she is casual poor. If an accident happens to a pauper in one parish, and he is taken immediately into the next parish, the latter parish, and not the former, is liable for the expense of the cure. In this ease, during the pauper's illness, she was in her own parish,

and therefore it is clear that the defendants, as overseers of Heybridge, are not liable for her cure without an express promise for that purpose. There may be circumstances attending the removal of a casual pauper, from which an implied liability to provide for him in the adjoining parish, will arise, but in this case there are no circumstances from which such a liability can be implied. In the first place, the defendants, as parish officers, are wholly ignorant of the transaction, and take no part in it from the beginning to the end; and, in the second, the conduct of the constable is free from blame, and he acts bona fide and without fraud, in removing the pauper, she having been carried to her own parish at her own desire. Assuming that the constable was culpable in removing the pauper out of Heybridge, that might render him personally punishable, but it could not make the defendants liable, they having had no personal knowledge of what took place. It is submitted therefore, that, as there is neither an express or an implied liability made out against the defendants, the present verdict ought not to stand.

ABBOTT, C. J.—I think this rule ought to be discharged. This woman met with the accident in the parish of *Heybridge*. The accident entirely disabled her from going to her own place of abode in her own parish. If, therefore, she had been taken to any house in *Heybridge*, as she ought to have been, and relief had been administered to her there, it is clear that the parish officers would have been liable for the expenses of her cure; and it is clear, that according to the authority of *Rex* v. St. James's, in Bury St. Edmonds(a), it would not have been competent for the parish officers to treat her as a person coming to settle in *Heybridge*; and that if an order of removal had been made, it must have been suspended under the statute, until the state of her bodily health

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taken to a house in Heybridge, the parish officers would have been under a legal as well as a moral obligation to provide medical assistance for her. One of the parish officers did recommend that she should be taken to the nearest public-house, which was in Heybridge. The keeper of the public-house refused to open his door and receive her. A proposal is then made to take her to the poor-house, and in the way there, some conversation arises, which creates a doubt in the mind of the poor woman, (who had been then suffering for some hours), whether, even when she gets there, she will be properly received. and in the anxiety of the moment she entreats to be sent to her own home. The first thing intended was to remove her to her own parish, but at the desire of the driver of the cart, the constable forbears to do so. She is, however, ultimately taken to her own house, and the constable of Heybridge sends for the plaintiff, and desires him to attend the woman. It is clear that if she had remained at Heye bridge, the overseers of that parish must have been at the expense of the medical attendance requisite to effect her cure, and it seems to me, that her removal from that parish (although her own act) under the circumstances proved in evidence, connected with the fact, that the plaintiff was called in from the parish of St. Mary, Maldon, does not relieve the parish of Heybridge from the obligation to which they would have been clearly liable, if the woman had been taken into some house in Heybridge, and there attended by a surgeon. For these reasons, it seems to me, that the verdict is right, and that the rule for setting it aside ought to be discharged.

BAYLEY, J.—I also think that the verdict in this case was perfectly right. It is of great importance, with a view to the protection to which the poor are entitled, that it should be distinctly understood upon whom, under such circumstances as appear in the present case, the legal obligation attaches of providing medical attendance.

I do not put this case upon the ground of any moral obligation on the part of the defendants, nor upon the ground of the constable having sent for and employed the surgeon; but I put it upon the ground that the law imposed a legal obligation upon the defendants, as the parish officers of Heybridge, to employ a surgeon for the cure of the pauper. I think it is highly prejudicial to the interests of the community, and to the rights of the poor, that when an accident happens, the question shall be agitated, or even pass in the minds of those persons in whose power the sufferer is of necessity first placed, whether a burden, which must fall somewhere, must be borne by them, or can be shifted by some contrivance upon the shoulders of others. If there were any doubt upon this point, the consequence will be that poor persons, who ought not to be removed from the place where they have met with an accident, will perhaps, at the risk of their lives, but certainly with great aggravation of their personal sufferings, be removed to a distance. In this case the pauper met with the accident in Heybridge, which accident incapacitated her from moving herself from the spot where she happened to be thrown. Now the most obvious thing to do under such circumstances, would have been to do that which the magistrate of the place suggested should be done, namely, to have put her into a public house; but if she could not be placed there, she ought to have been placed in the poor-house of the parish, and if not there, she ought to have been provided for in some other house in the parish. I consider in point of law, that when the parish officers refused her an asylum in that parish and forced her to go to her own house, all the attendance given by the plaintiff in the parish of ·Maldon, in consequence of the wrongful conduct of some of the parishioners of Heybridge, is to be considered exactly as if it had been given in the parish where the accident happened, and as if the house which the pauper occupied had been in the parish of Heybridge. In Lamb

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v. Bunce, relied upon by the defendant, my Lord Ellenborough speaks not of the moral, but of the legal, obligation attaching on the parish in a case of this description. He says, "it cannot be matter of dispute in point of law, and I could wish it were so understood, that where time is not afforded for procuring an order of justices, the law raises an obligation against the parish where the pauper lies sick, as casual poor, to look to the supply of his necessities." Now founding my opinion on the authority of that case, I consider that as in this case the party met with the accident in Heybridge, that was the proper place for her to be in, and that the law raises a legal obligation upon the parish officers of Heybridge to give relief. Lord Ellenborough says, in continuation, "and if the parish officer stands by and sees that obligation performed by those who are fit and competent to perform it and does not object, the law will raise a promise on his part to pay for the performance." It may be said that the parish officers in this case do not stand by and see the attendance given to the pauper, because she is attended not in Heybridge, but in Maldon. But when the overseers know, as they must, that medical attendance upon this poor woman was a matter of indispensable necessity, and that the removal from Heybridge to Maldon, was wrongful, it seems to me exactly the same as if they had stood by and seen the attendance of the surgeon upon the pauper in the parish of Heybridge. In addition to the case of Lamb v. Bunce, I find a subsequent case of Gent v. Tomkins, reported in the first volume of Messrs. Dowling and Ryland's Reports, 541, from which it may be collected, as the opinion of the Court, that the law casts the obligation of providing medical attendance for a pauper disabled by an accident upon that parish where the accident has happened. In that case the action was brought, not against the overseers of the parish in which the accident happened, but against the overseer of the parish to which the pauper belonged, and the Court intimated a very strong

opinion that the action was not properly brought against the overseers of the latter parish. It may happen, and insome instances it does, that the parish in which the accident happens may not be the proper parish to give the relief. It may possibly happen that the parish officers, without entering into the question what are the limits of particular parishes, or very nicely considering the precise line of their duty, will do that which ought to be done immediately, namely, direct the pauper to be removed to the house nearest the place where the accident happens, as the most proper place, instead of carrying her to a considerable distance. In the case adverted to, the impression of the Court was, that the parish in which the house was situated was the proper parish to have given the relief; but without giving any distinct judgment upon that point, I am of opinion that inasmuch as in this case the accident happened in Heybridge, and that was the place where under all the circumstances the pauper was entitled to receive surgical assistance, the plaintiff is entitled to look to the parish of Heybridge for the discharge of his demand.

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HOLBOYD, J.—I am of the same opinion. The parish of *Heybridge* being primary liable to assist the pauper as casual poor, I think they could not shift their liability by removing her into the adjoining parish, even at the desire of the pauper herself.

LITTLEDALE, J.—The law casts the obligation upon the parish where the accident happens, to afford the necessary relief, and I think in this case, that the defendants as overseers of the parish of *Heybridge*, are liable to the plaintiff under the circumstances proved in evidence, and that such liability could not be discharged by the improper conduct of some of the parishioners in removing the pauper, even with her own consent, into the parish of *St. Mary, Maldon*.

Rule discharged.

Saturday, 10th June.

GOODTITLE, on the demise of DODWELL v. GIBBS.

By deed of lease and re-lease, M. H. conveyed to J. W. and to his heirs and assigns, divers freehold and copyhold premises, habendum unto the said J. W., his heirs and assigns from and immediately after the decease of M. H. to, for, and upon the several uses, ends, intents, and purposes thereinafter mentioned :-Held, that by the premises an immediate estate of freeto J. W., and that the habendum did not make void the deed as conveying a freehold in

futuro.

THIS was an ejectment to recover the possession of certain lands and premises, situate in the parish of White Waltham, in the county of Berks. Plea, not guilty, and issue thereon. At the trial before Burrough, J., at the Berkshire summer assizes, 1825, the plaintiff obtained a verdict, subject to the opinion of this Court, upon the following case:-

Martha Hatton in her lifetime, and at the time of the making of the surrender to the use of her will, and making such will, and executing the deeds hereinafter mentioned, was seised of estates of inheritance in fee simple, in the premises in question, consisting of a messuage and buildings, and about five acres and a half of freehold land, and three closes of land which are copyhold, situated as aforesaid; and being so seised, she, on the 9th of February, 1763, surrendered the said copyhold premises to and for such uses, intents, and purposes, and to and for the benefit of such person and persons, and his, her, and their hold was given heirs, as the said Martha Hatton by her last will and testament in writing already had, or at any time thereafter should limit, direct, appoint, or give the same. Hatton duly executed a lease and release of the said freehold premises as follows: the lease without date, and the release bearing date the 29th day of July, 1768, and made between Martha Hatton of the one part, and John Westbrook, the elder, of the other part, and by the latter indenture it was witnessed, that for the settling and assuring the messuages or tenements, lands, hereditaments, and premises thereinafter mentioned, to and for the several uses, intents, and purposes, thereinafter particularly mentioned, the said Martha Hatton, for and in consideration of the sum of 10 shillings paid by the said John Westbrook, the elder, the receipt whereof was thereby acknowledged, and for other causes and considerations her thereunto

moving, did grant, bargain, sell, alien, release, and confirm unto the said John Westbrook, the elder, in his actual possession then being by virtue of a bargain and sale to him thereof made for one whole year, by indenture bearing date the day next before the day of the date of the indenture of release, and by force of the statute made for transferring uses into possession, and to his heirs and assigns, divers hereditaments, including by description the freehold and copyhold premises in question, to hold the same unto the said John Westbrook the elder, his heirs and assigns, from and immediately after the decease of the said Martha Hatton, to, for, and upon the several uses, ends, intents, and purposes thereinafter mentioned, expressed, and declared of and concerning the same; that is to say, to the use of the said John Westbrook, the elder, from and immediately after the decease of the said Martha Hatton, and Anna his wife, and their assigns, for and during the term of their natural lives, and the life of the longer liver of them; and from and after the decease of the survivor of them the said John Westbrook, the elder, and Anna his wife, to the use and behoof of John Westbrook, the younger, son of the said John Westbrook, the elder, and his assigns, for and during the term of his natural life, without impeachment of waste; and from and after the decease of the said John Westbrook the younger, to the use and behoof of the first and other sons of the body of the said John Westbrook, the younger, lawfully to be begotten, severally and successively, and the heirs male of the body of such first and other sons lawfully issuing; and for want of such issue, to the use and behoof of Hatton, the daughter of the said John Westbrook, the elder, and Anna his wife, her heirs and assigns for ever. And the said Martha Hatton covenanted for further assurance of the said freehold and copyhold premises to the uses aforesaid, but no surrender was made of the copyhold land to the uses aforesaid. The lessor of the plaintiff was the daughter of Hatton, the daughter of John Westbrook and Anna his wife, by Henry Dodwell, her husband. John

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Westbrook, the elder, and John Westbrook, the younger, suffered a recovery in 1774, but it was admitted, that it did not bar the remainder given to Hatton Westbrook, by the release of 1768, the only question raised being as to the validity of that deed.

. Coote, for the lessor of the plaintiff. The question in this case arises upon the form of the habendum in the deed of the 29th of July, 1768. It will be contended on the other side, that by such a form of habendum, the deed gives an estate in freehold in futuro, and is consequently void. The granting part of the deed is abundantly certain and express, for it is " to John Westbrook, the elder, his heirs and assigns." Then follows the habendum, "to hold the same unto the said John Westbrook, the elder, his heirs and assigns, from and immediately after the decease of the said Martha Hatton, to, for, and upon the several uses," &c. Now if that sentence is read, as it fairly may be, with a stop after the words "heirs and assigns," the grant becomes immediate, though uses may arise in futuro. But, independently of that point, the habendum is not an essential part of a deed; Shep. Touch. 76; and if it is repugnant to the granting part of the deed, it must be rejected. It must be admitted, that there are cases apparently leading to the contrary conclusion, but they will all, upon examination, be found to be distinguishable from the present. The general rule of distinction is this:—if an estate is granted in the premises, and is an express and certain grant, it cannot be vitiated by the habendum, for utile per inutile non vitiatur; but if the grant in the premises is not express, but implied by operation of law, a void habendum would defeat the deed. Shep. Touch. 112. 2 Bl. Com. 298, Baldwin's Case (a), Stukeley v. Butler (b), and Carter v. Madgwick (c). The last of those cases is expressly in point in favour of the lessor of the plaintiff here. Then as to the decisions apparently the other way,

<sup>(</sup>a) 2 Rep. 23.

<sup>(</sup>b) Hob. 168.

<sup>(</sup>c) 3 Lev. 339.

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## TRINITY TERM, SEVENTH GEO. IV.

the first is Buckler's Case (a). There, "Buckler, tenant for life, made a lease for years, and granted tenementa prædicta to C., habendum tenementa prædicta from the feast of the nativity of St. John the Baptist next following, for life." It was resolved, "that the grant to C. was void; for the law will make construction upon the whole grant; and an estate of freehold cannot commence in futuro. And the habendum in this case is not contrary to the premises; for no certain estate is contained in the premises, but generally the land given and granted, which might be qualified by the habendum to an estate for years, or at will." In Hogg v. Crosse (b), an habendum of an estate in freehold in futuro, was also held to defeat the grant, but the reasons given by the Court for their decision, fully support the present argument. They said, "it appeareth to be the intent of the feoffor that no estate shall pass, but in futuro. viz., after his death, which is against law; and it being all the purport of the deed, nothing shall pass in any other manner, for nothing shall pass by the premises, but according to his intent, which is nothing, for he intended not to pass the freehold immediately. But if one grant a term by deed, habendum after his death, this doth pass by the premises, for the premises are sufficient to carry it, and the habendum shall not utterly destroy it; but it is otherwise here, where it is to take effect by the limitation of the party, which is void." The decision there was regulated by the purport of the deed, and the intent of the grantor; and that rule has been followed in other cases. Tranmer (c), Osmond v. Sheafe (d). There is one other case upon this point, which is in favour of the lessor of the plaintiff, Underhay v. Underhay (e). There, "J. S. made a lease for three lives, and after let the land to W., habendum to him for his life, which said term to begin and have being after the death, surrender, or forfeiture, of the

(a) 2 Rep. 55.

(d) 3 Lev. 370.

<sup>(</sup>b) Cro. Eliz. 254.

<sup>(</sup>e) Cro. Eliz. 269.

<sup>(</sup>c) Willes, 682. 2 Wilson, 75.

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three lives. The question was, if this were a good lease, because the words which said term, appoint that nothing shall begin till after the death. And it was adjudged that for as much as the estate was fully limited before the words which said term, those words are vain and idle; for, utile per inutile non vitiatur." Upon this question, therefore, as connected with the common law, the result, after considering all the authorities, is, that the granting part of the deed is good. Then, as regards the limitation to uses, the utmost alteration of the common law effected by the Statute of Uses, is this, that the granting to uses may operate as a conveyance of the freehold in futuro; for a limitation by way of springing use is clearly good, so that the event upon which the use is to arise, is to happen within a period which the law deems reasonable; namely, a life, or lives, in being, and a period of twenty-one years after; Roe v. Tranmer (a), Osmond v. Sheafe (b), Davis v. Speed (c), Pybus v. Mitford (d), and Fearne's Cont. The result is, that this is a valid deed, Rem. 41, 2d. ed. and that the plaintiff is entitled to recover.

Preston, contrà. The second point merges in the first; for the grant being void as a grant of a freehold in futuro, the uses cannot arise; debile fundamentum fallit opus. The lessor of the plaintiff is bound to shew a good legal conveyance, and that he cannot do. The rules of law alluded to on the other side may be admitted, but they do not apply to the present case. Neither do the cases that have been cited; for in all of them the conveyance was held to operate as a covenant to stand seised. The only case in point for the plaintiff is that of Carter v. Madgwick (e), which is not law. It is reported by Levinz only; it is not to be found in any one of his numerous contemporary reporters, as almost all the other cases are; it has never been quoted or adopted by any Judge; and it is

<sup>(</sup>a) Willes, 684. 2 Wilson, 75.

<sup>(</sup>d) 1 Ventr. 372.

<sup>(</sup>b) 3 Lev. 370.

<sup>(</sup>e) 3 Lev. 339.

<sup>(</sup>c) 2 Salk. 675.

ought to regulate the construction of deeds. Observe what that case really is :- "Parker, seised in fee, by indenture between him and J. B., his grandson, the lessor, in consideration of affection, and five shillings, granted, bargained, and sold, to the lessor and his heirs, the tenements in question, habendum, immediately after his death, to the lessor and the heirs male of his body." The Court held, that the estate passed immediately by the premises; and what was the effect of that? The effect was, to convert an estate tail into a fee simple; and a grant in futuro, subject to a life estate to the grantor, into a grant of the estate instanter to the grantee: in both which respects it defeated the evident intention of the grantor. It must be conceded, that the habendum is not necessarily an essential part of a deed; but when it is inserted, it is essential, unless it is repugnant to the granting part. It may also be conceded, that the repugnant part may be rejected, where the former grant of the estate is express; as was held in Stukeley v. Butler (b), and other cases: but the question is always as to the repugnancy. If a grant is to A. and his heirs, ha-

bendum, for the life of A., that is clearly repugnant; Plowden, 153: but here there is no repugnancy; the uses here cannot be supported, even by rejecting the habendum. [Bayley, J. But may they not be supported by a particular construction of the habendum? For instance, if the habendum is read with a stop after the words "heirs and assigns," the seisin is given immediately, and nothing is in future but the uses]. The deed cannot be so read; it must be looked at as if it had been made previous to the passing of the Statute of Uses: and, independently of the uses, this is merely a grant to A. and his heirs, habendum in future. The declaration of uses does not commence until after the habendum is closed; Braine v. Deukon (b). Where the grant of the estate is not express, it may be controlled by the habendum; and the habendum is to be looked at for

(a) Hob. 168.

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<sup>(</sup>b) Preston on Estates, 229.

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the purpose of ascertaining the nature of the grant, whether it is a grant in fee, or in tail, in præsenti, or in futuro; 2 Rol. Abr. Grant. p. 68. An estate to a man and his heirs is not an express estate, it is an implied estate: and then Hogg v. Crosse (a), and that class of cases, fail to support the argument built upon them. Here the estate is not express, for it is to A. and his heirs; but the heirs were intended to take in the mode stated in the habendum. Looking at the deed altogether, and considering the evident intent of the grantor, this is clearly a grant of an estate in freehold, to commence in futuro, and therefore void.

Coote, in reply. No case has been cited in which Carter v. Madgwick (b), has been overruled; and it is cited as law by Lord Chief Baron Comyns, in his Digest (c). The case was argued on a former day in this term, when the Court took time for consideration; and judgment was now delivered by

ABBOTT, C. J.—This case came before the Court during the present term. The only question raised in argument was, as to the validity of a deed executed by Martha Hatton, as to the freehold tenements therein mentioned. The objection taken to the validity of the deed of lease and release was, that it is a grant of a freehold to commence in futuro, and if this be its true effect it is undoubtedly void. The question whether this be its true effect, depends upon the operation of the habendum. If the habendum is to be considered as the operating part of the deed, the deed will be an attempt to convey a freehold in futuro. If the part called the premises be the operating part, and the habendum can be rejected, or considered only as qualifying the premises, a present freehold will pass, and the deed will be good. Many cases were quoted

<sup>(</sup>a) Cro. Eliz. 254.

<sup>(</sup>c) Com. Dig. Fait. E. 10.

<sup>(</sup>b) 3 Lev. 339.

in the argument, to which it is not necessary to advert again. The distinction as to the effect of the habendum, between deeds in which the premises expressly mention an estate or interest, and those in which the premises merely describe the tenements, but do not mention any estate or interest, was noted and relied upon, and it was contended that in the deed in question the premises do mention an estate and interest (as we think they do), and the case of Carter v. Madgwick (a), was cited as being directly in point with the present case. The distinction to which I allude is this:-If no estate be mentioned in the premises, the grantee will take nothing under that part of the deed except by implication and presumption of law, but if an habendum follow, the intention of the parties as to the estate to be conveyed will be found in the habendum, and consequently no implication or presumption of law can be made; and if the intention so expressed be contrary to the rules of law, the intention cannot take effect, and the deed will be void. On the other hand, if an estate and interest be mentioned in the premises, the intention of the parties is shewn, and the deed may be effectual without any habendum; and if an habendum follows, that is repugnant to the premises or in contravention of the rules of law, and incapable of a construction consistent with either, the habendum shall be rejected, and the deed stand good upon the premises. This was done in Carter v. Madgwick; but the very learned gentleman who argued for the defendant, and against the validity of the deed, observed, that that case was a solitary decision, never quoted or relied upon, and contrary to law, as it gave an immediate estate to the grantee, whereas the grantor manifestly intended to reserve a life estate to himself. Perhaps so much of the opinion of the Court as regards the exclusion of a life estate in the grantor may be found to have been expressed without sufficiently adverting to the operation of the Statute of Uses, or to a construction that

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might have been given to the deed, so as to allow a life estate. The grantor had, in fact, enjoyed during life in that case, as in the present. But the case of Carter v. Madgwick, is not a solitary decision. The case of Jarman v. Orchard (a) is to the same effect. In that case Thomas Nicholas being possessed of a cottage, barn, and lands, as assignee of a lease for 1000 years, did by indenture, reciting the lease, and expressed to be in consideration of natural love to his granddaughter, and for other good causes and considerations, grant, assign, and set over to his granddaughter Mary, her executors, administrators; and assigns, all the said cottage, barn, and lands, and all other the premises thereinbefore recited, together with the recited lease, and all writings and evidences touching the premises, habendum the said cottage, &c., to the said Mary, her executors, administrators, and assigns, from and after the decease of the said Thomas Nicholas and his wife, for the residue of the term, subject to the rent and covenants. Now, if this deed was considered as an assignment to commence and take effect after the death of Thomas Nicholas, the deed would be void, as in law assigning nothing, the life interest of Thomas Nicholas being deemed in law to be of greater value and longer duration than any term of years. And it was contended that the deed could only be construed as such an assignment, because it appeared that Thomas Nicholas did not mean to part with his interest in the term during his own life. The question arose there after the death of Thomas In the King's Bench, judgment was given against the validity of the deed, but that judgment was reversed in the Exchequer Chamber, and the reversal affirmed in parliament. And the ground of the reversal was, that the entire residue of the term passed by the premises of the deed, and the habendum was void.

In the present case, we think an immediate freehold passed by the premises in the deed, and consequently, the

(a) Skin. 528. Salk. 346. Show. P. C. 199.

objection that the deed passed only a freehold to commence in futuro, cannot prevail. Mary Hatton, the releasor, is now dead, and, therefore, perhaps it may not be necessary to decide whether any use vested in her for her life. We think, however, that the use did vest in her for her life, and so the deed will stand good in all its parts. and effect will be given to the intention of the parties, which ought to be done, if by law it can. The release is expressed to be made in consideration of ten shillings paid by John Westbrook, the elder, and other causes and considerations. John Westbrook had married a cousin of Martha Hatton, and the deed was evidently intended as a family settlement. Now, if the consideration of ten shillings had not been expressed, and the deed had contained no habendum, we think the use of the entire fee would have resulted to Mary Hatton by implication and presumption of law; and upon supposition of the absence of this consideration, and the insertion of the habendum, we think the effect of the habendum would be partially to rebut the implication and to narrow the use to an estate for life in Mary Hatton; and if the mention of this consideration of ten shillings should have the effect of preventing a resulting use to Mary Hatton, and in the absence of an habendum, should vest the use of the entire fee in John Westbrook, [a point upon which we think it unnecessary to give an opinion] still this use would only arise by implication and presumption of law, grounded on the pecuniary consideration, and would not be a use expressed in the deed. And this being so, we think the habendum might have in this view of the case, the effect also of partially rebutting the implication and presumption of law, by shewing the intention of the parties to be that the use should not vest in John Westbrook until after the death of Martha Hatton, and this would be good in law, inasmuch as a use may be limited in futuro, and then the use of so much of the estate as was not limited or declared by the deed might in our opinion result to and vest in

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Mery Hatton, and upon either of these constructions of the deed, effect will be given to the whole of the instrument and to the intention of the parties. The postea must, therefore, be delivered to the plaintiff.

Postea to the Plaintiff.

Saturday, June 10th.

The King v. Thomas Flower.

An indictment for embezzlement, under 39 G. 3, c. 85, must describe specifically some of the property embezzled. Where a prisoner pleaded guilty to an indictment charging, " that he received and took, on account of his master, divers sums of money, amounting in the whole to a large sum of money, to wit, the sum of 101., and embezzled the same," and was adjudged to be transported :---Held, that the indictment the Court reINDICTMENT for embezzlement, under the statute 39 Geo. 3, c. 85, stated, that the prisoner, being the servant of the prosecutor, on, &c., did, by virtue of his employment as such servant, receive and take into his possession, for and on account of the prosecutor, divers sums of money, amounting in the whole to a large sum of money, to wit, the sum of 101., and afterwards embezzled it. At the Wiltshire Lent assizes, 1825, the prisoner pleaded guilty to this indictment, and was adjudged to be transported beyond seas for the term of seven years; upon that judgment, a writ of error was brought.

Chitty, for the prisoner, was stopped by the Court, who desired to hear

R. Bayly, contrà. This indictment is maintainable; and Rex v. Johnson (a) is an authority in point. It was there held, that in an indictment upon this very statute, 39 Geo. 3, c. 86, for embezzling bank notes, it was a sufficient description of the notes to say, divers, to wit, nine bank notes, for the payment of divers sums of money, amounting in the whole to a certain sum of money, to wit, the Court reversed the judgment, and refused to remand the prisoner.

(a) 3 M. & S. 539.

the sum of 91., and of the value of 91. [Bayley, J. That was because the word bank note, being mentioned in the act of parliament, was held to be a sufficient description of the species of property charged to be embezzled]. the word money is also mentioned in the act of parliament; and it has been held, that in an indictment for embezzling money, it is not necessary to set out the precise sum charged to be embezzled, Rex v. Carson (a). [Bayley, J. This indictment does not state to whom the money charged to have been embezzled belonged, and is clearly bad in that respect, upon the authority of Rex v. M'Gregor(b)]. But even if the indictment is held insufficient, still as the prisoner has pleaded guilty, and ought not to escape with impunity, this Court will not discharge him, but will remand him back to the inferior Court, in order that a sufficient indictment may be prepared, and the ends of justice saved from being thus defeated.

ABBOTT, C. J.—The case of Rex v. Furneaux (c), is quite decisive of the present. There the indictment charged that the prisoner, being a servant, &c., received the sum of one pound eleven shillings, for and on account of his master, and feloniously embezzled the same, &c. It was proved that 11.11s. was paid to the prisoner on account of his master, but it did not appear whether the same was paid by a one pound note, and eleven shillings in silver, or by two notes of 11. each, or by a 21. note, and the change given by the prisoner. The jury found the prisoner guilty. A question was reserved for the opinion of the Judges, whether the property received was properly set out in the indictment, or whether it ought not to have been specifically set out; and in Trinity term, 1817, all the Judges were of opinion, Burrough, J. dissentiente, that the indictment ought to set out specifically, at least some article of the property embezzled; and they held the conREX v. FLOWER.

<sup>(</sup>a) Russ. & Ry. Cr. Ca. 303.

<sup>(</sup>c) Russ. & Ry. Cr. Ca. 335.

<sup>(</sup>b) 3 B. & P. 106.

REX v. FLOWER. viction wrong. Afterwards, in *Michaelmas* term, 1817, in *Rex* v. *Tyers* (a), it was held upon a question reserved by me for the opinion of the Judges, that an indictment for embezzling must describe, according to the fact, some of the property embezzled. Now, here, the indictment does not describe any part of the property embezzled; it is, therefore, insufficient, and the judgment must be reversed. I think also, that the prisoner must be discharged. There is no party present whom we can bind over to prosecute; it would be difficult to say, to what custody we could properly commit the prisoner; and in the absence of any direct precedent or authority for such a step, I think we shall be going too far if we were to remand the prisoner.

The rest of the Court concurred.

Judgment reserved, and the prisoner discharged (b).

(a) Russ. & Ry. C. C. R. 402.

(b) Upon this latter point, see Rex v. Ellis, ante, 173.

Monday, 12th June.

DENN on the demise of NOEL v. ROAKE.—(In Error).

S. T. being seised in fee of one moiety of certain free-hold premises in the county of Surrey, and tenant for life, with power of appointment by deed or will, of the other moiety, devised as

ERROR from the court of Common Pleas. The action was in ejectment for a mill, dwelling-house, lands, and premises, situate in the county of Surrey. At the trial, before Richards, C. B., at the Surrey Lent assizes, 1823, a special verdict was found, which stated, substantially as follows:—

Miles Poole died seised in fee of the premises in question on the 17th November, 1749; and upon his death

follows:—"I hereby give and devise all my freehold estates in the city of London and county of Surrey, or elsewhere, to my nephew, J. R. for his life, on condition that out of the rents thereof, he do from time to time keep such estates in proper and tenantable repair."—Held, that this devise was not an execution of the power, and only passed to the devisee that moiety of which the devisor had an estate in fee.

they descended to Sarah, the wife of Thomas Scott, and Elizabeth, the wife of Henry Roake, which Sarah and Elizabeth were daughters and co-heiresses of Miles Poole. Thomas Scott and Sarah his wife, and Henry Roake and Elizabeth his wife, by lease and release, dated respectively the 25th and 26th April, 1750, conveyed the premises to one Hill, to the intent that he might become a good and perfect tenant of the freehold for suffering a recovery. It was declared by the deed, that the recovery should enure, as to one undivided moiety of the premises, to the use of Thomas Scott for life, without impeachment of waste; remainder to the use of Sarah Scott for life; remainder to the use of such person and persons, for such estate and estates, as Sarah Scott, whether covert or sole, should by any deed or writing under her hand and seal, to be sealed and executed in the presence of three or more credible witnesses, with or without power of revocation, or by her last will and testament in writing, or any writing purporting to be her last will and testament, to be by her subscribed and published in the presence of three or more credible witnesses, from time to time direct, limit, or appoint; and for want of such appointment, to the use of all the children of Thomas Scott and Sarah his wife, as tenants in common in tail; and in default of such issue, to the use of Elizabeth Roake for life, without impeachment of waste; remainder to her children as tenants in common in tail: and for default of such issue, to the use of Thomas Scott in fee. There were similar limitations as to the moiety of which Henry Roake and Elizabeth his wife were seised. In Easter term, 1750, a recovery was In 1758. Thomas Scott died without issue, leaving Sarah his wife him surviving. In 1763, Sarah Scott intermarried with John Trymmer, who died in 1766, leaving Sarah Trymmer him surviving. In May, 1775, Elizabeth Roake died, leaving Henry Roake her husband, and John Roake her son and only child by the said Henry Roake, her surviving, and without having made any deed,

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writing, will, or appointment, for, or in respect of, the premises in the declaration mentioned. By lease and release dated respectively the 6th and 7th September, 1775, (the release reciting a contract between Sarah Trymmer and John Roake for the absolute purchase of his. moiety of the premises, subject to the life estate of his father, Henry Roake), Henry Roake and John Roake, conveyed the premises to one Parnell, to make him tenant to the pracipe, for the purpose of suffering a recovery, to the use of Henry Roake for life, remainder to Sarah Trymmer On, or about, the 15th December, 1775, Henry in fee. Roake died. On the 6th June, 1783, Sarah Trymmer made and published her last will and testament in writing, in the presence of, and attested by, three credible witnesses, and thereby gave and devised all her freehold estates in the city of London and county of Surrey, or elsewhere, in the following words, viz:-" I hereby give and devise all my freehold estates in the city of London and county of Surrey, or elsewhere, to my nephew John Roake, for his life, on condition that out of the rents thereof he do from time to time keep such estates in proper and tenantable repair; and on the decease of my said nephew John Roake, I devise all my said estates, subject to and chargeable with the payment of 30%. a year to Anne, the wife of the said John Roake, for her life, by even quarterly payments, to and among his children, lawfully begotten, equally, at the age of 21 years, and their heirs, as tenants in common; but if only one child should live to attain such age, to him, or her, and his, or her heirs, at his or her age of 21." In default of issue of John Roake, there was a devise to other persons. On the 4th December, 1786, Sarah Trymmer died, without revoking her said will, the said John Roake being then living, and her heir at law. Sarah Trymmer had not at the time of making her will, or at the time of her death, any other freehold lands, tenements, or hereditaments, in the county of Surrey, than those mentioned in the declaration. There were some facts found by the special verdict, relative to the title of the lessor of the plaintiff, which have not been set out, because the judgment, both of the Court below, and of this Court, proceeded upon the construction of the will of Sarah Trymmer. The court of Common Pleas decided that the will of Sarah Trymmer. formerly Scott, operated as an execution of the power reserved to Sarah Scott by the deed of 1750, and consequently gave judgment for the defendant (a).

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Preston, for the plaintiff in error. Sarah Trynmer was tenant for life of a moiety of the Surrey estates, with a power of appointment; and if her will operated as an execution of that power, it is admitted that the lessor of the plaintiff cannot recover. The Court below were of opinion that her will did so operate; but they were clearly mistaken in point of law. The invariable rule of law is, that whoever exercises a power of appointment. must use words unequivocally shewing that he intended so to exercise it. From Sir Edward Clere's case (b), in the reign of Elizabeth, down to the case of Coates v. King (c), in the present reign, that has been an acknowledged governing principle. The intention must appear upon the face of the deed, or the will, and in specific words; there must be something specific, having reference to the power or its subject matter, and shewing that the party supposed to exercise the power, had at the time of such exercise the power itself in his view and recollection: general words will not serve for such a purpose. Assuming that these general propositions are correct, and they probably will not be disputed, the only question is, what is their bearing upon the present case. Now the. devise here is in very peculiar terms; the words are these: "I give and devise all my freehold estates in the city of London, and county of Surrey, or elsewhere, to my nephew, John Roake, for his life." Those words do not (c) Decided September, 1821, be-

<sup>(</sup>a) 2 Bing.

fore the Privy Council.

<sup>(</sup>b) 6 Rep. 18.

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imply that the testatrix intended to deprive her nephew of his estate tail in one moiety, and to give him instead an estate for life merely. If she had used the expression, "all my estate called A., in the county of Surrey," that might have passed both moieties, because her describing the estate by name, would have shewn that as to that moiety over which she had only a power of appointment, The condition annexed she was acting under that power. to the devise, namely, that the devisee "out of the rents thereof do from time to time keep such estates in proper and tenantable repair," will perhaps be urged on the part of the defendant, as shewing that the testatrix had her power of appointment in view; but they have in truth no such effect; for the direction to repair applies to such estates only as she had previously devised, and therefore cannot operate to extend the meaning of the words of this All the leading cases upon this subject are cited by Best. C. J., in delivering the judgment of the Court below, but upon examination they will be found not to warrant that judgment. The first is Sir Edward Clere's case (a). It was there resolved, that where a man makes a feoffment to the use of his will, and afterwards by his will devises the land itself, as owner of the land, without any reference to his authority, there it shall pass by the will; for, when he devised the land itself without any reference to his authority or power, he declared his intent to devise an estate as owner of the land by his will, and not to limit an use according to his authority; though in the case then at bar, as the testator had no power to devise the land as owner, it was held that the devise ought of necessity to enure to a limitation of an use, for otherwise the devise would be utterly void. Andrews v. Emmott (b), Ex parte Caswall (c), Langham v. Nenny (d), Nunnock v. Horton (e), Bennett v. Aburrow (f), Bradley v. Westcott (g),

<sup>(</sup>a) 6 Rep. 13.

<sup>(</sup>e) 7 Ves. 391.

<sup>(</sup>b) 2 Bro. C. C. 297.

<sup>(</sup>f) 8 Ves. 609,

<sup>(</sup>c) 1 Atk. 559.

<sup>(</sup>g) 13 Ves. 445.

<sup>(</sup>d) 3 Ves. 467.

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are all authorities to shew that a power can only be executed by express words, or manifest intention; and in Maddison v. Andrew (a), where the will was held to operate as an execution of the power, it was upon the ground that the testator had used in the devise the identical expression used in the power, and had thereby shewn an intention to execute the power. Jones v. Tucker (b), Jones v. Currie (c), and Coates v. King, already mentioned, are all likewise authorities in favour of the lessor of the plaintiff; the latter especially. There a father by will devised certain real estates in Antigua equally among his three sons, giving to one of them a power of devising away his share. That one was possessed of large estates in Antigua, both real and personal, besides that so devised to him by his father, and he devised to A. B., "all my real estates in Antigua, and all other my real estate whatsoever and wheresoever." Those were stronger words than the will in this case contains, and yet it was held that the estates over which the son had a power, did not pass by his will. The only case at all in point that can be cited on the part of the defendant, is that of Standen v. Standen (d); and Best, C. J., in delivering the judgment of the Court below in this case, says, that the reasoning of Lord Loughborough, by whom that case was decided, is not supported by any preceding authority, and has been doubted in many subsequent cases.

Jemmett, contrà. In determining whether a devise is or is not an execution of a power, an important distinction has been taken by the Courts, and wholly overlooked by the other side, namely, between a devise of real, and of personal estate. It must be admitted, that where the devise is of personal property, the intention to pass it must be expressed, or at least must appear, on the face of the will; but where the devise is of real property, it is

<sup>(</sup>a) 1 Ves. sen. 57.

<sup>(</sup>c) 1 Swanst. 66.

<sup>(</sup>b) 2 Meriv. 533.

<sup>(</sup>d) 2 Ves. jun. 589.

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otherwise. Standen v. Standen, Nannock v. Horton, and Jones v. Currie. Looking at the circumstances under which the will in this case was made, and as they are detailed in the special verdict, it is impossible to doubt the intention of the testatrix to give to her nephew the whole of the estate which she held for her life; not that she intended by the word estate to give him only her interest in the land, but to vest in him the whole of that land, which she considered herself, when she made the will, entitled to call "my estate." It is said, that the decision of Lord Loughborough, in Standen v. Standen, has been impugned; but it was confirmed on appeal in the House of Lords, and has never been overruled: and it is certainly a very strong authority in favour of the construction now suggested on the part of the defendant. In that case the testator directed his real estate to be sold, and bequeathed the proceeds of the sale, and the rest of his personal estate, in trust for his wife for life; and after her death, one moiety thereof for such person or persons as she should by any deed, or writing, or by will, with two or more witnesses, appoint. The real estate was not sold, but the testator's widow received the rents and profits of that, and the produce of the personal estate, during her life; and by her will, after some specific legacies, she devised thus: "I give all the rest, residue, and remainder of my estate and effects, of what nature or kind soever, and whether real or personal, and all my plate, &c., which I shall be possessed of, interested in, or entitled to at the time of my decease, subject to, and after payment of, all my just debts, funeral expenses, and charges of proving my will, and specific legacies, to S. H." It was held, that the moiety of the real estate devised to the testatrix by her husband, passed by her will; and the Lord Chancellor said. "It is a little hard to attempt to explain that it was not her estate. How could she have it more than by enjoyment during life, and the power of disposing to whatever person, and in whatever manner she pleased, with the

small addition of two witnesses?" Morgan v. Surman(a), Roach v. Wadham (b), and Dillon v. Dillon (c), are authorities for saying, that in cases where the question of the intention to execute the power arises, a liberal construction ought to prevail; and in the first of those cases, the decision in Standen v. Standen was cited and relied upon by Mansfield, C. J. There is, however, one case where the devise was of personal property, and yet where the decision is in favour of the defendant; Hales v. Margerum (d). There Samuel Rutter, by his will, gave to his executors 1000%, stock upon trust, "for the sole use and benefit of my daughter E. T., the same not to be subject to the debts, &c., of her husband; and whenever she shall happen to die, the said 1000l. stock shall be absolutely in her own power to dispose of by her last will and testament," &c. E. T., the daughter, did devise by will "all my freehold messuages, lands, woods, and hereditaments, and also my stocks, funds, monies, and securities, and all other my real and personal estate and effects whatsoever, to S. M.;" and it was held, that the 1000l. stock passed under the general words in her will. Here, besides the intention deducible from the circumstances under which the will was made, as already pointed out, the stipulation for repairs is a material, though not a conclusive, circumstance; because, if the whole estate was to pass, such a stipulation is intelli-

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Preston, in reply. In Coates v. King, the devise was of real estate; no answer, therefore, has been given to that case, by those in which the distinction between devises of real and personal estate has been admitted. That distinction may exist to a certain extent, but it does not affect the present case; because, in all the instances cited on the

gible, but if a moiety only was to pass, it would be extremely difficult either to understand such a stipulation, or

to carry it into operation.

<sup>(</sup>a) 1 Taunt. 289.

<sup>(</sup>c) 1 Ball & Bea, 77.

<sup>(</sup>b) 6 East, 289.

<sup>(</sup>d) 3 Ves. 299.

DENN U. ROAKE. other side, where the devise was held to be an execution of the power, there were circumstances proving to demonstration, upon the face of the will, an intention to execute the power. Here there are no such circumstances. Hales v. Margerum is utterly inapplicable, because it was there held, that the first devise was not a power, but an absolute gift, and the decision of the Master of the Rolls proceeded upon that ground.

The case was argued on a former day in this term, when the Court took time for consideration. Judgment was now delivered by

ABBOTT, C. J.—This was a writ of error upon the judgment of the court of Common Pleas, on a special verdict. The declaration was in ejectment for the recovery of certain messuages and lands situate at Godalming in the county of Surrey. After stating the circumstances found in the special verdict, his Lordship proceeded:-The question is, whether or not the will made by Sarah Trymmer in 1783, be a good execution of the power of appointment, contained in the deed of lease and release of the 25th and 26th April, 1750. The principal authorities bearing on this question were all referred to and commented upon in the elaborate judgment delivered by the Lord Chief Justice of the Court of Common Pleas, and it is unnecessary for me to refer to them again. principle of decision applicable to this case, appears to have had its origin in the case of Sir E. Clere (a). best exposition of it seems to be that given by Lord Chief Justice Hobart in the Commendam case (b). That learned Judge said, "If an act will work two ways, the one by an interest, the other by an authority or power, and the act being different, the law will attribute it to the interest, and not to the authority, and so you must take it, for fictio cedit veritati. And, therefore, so it was ruled in Sir E. Clere's case, that if a man be seised of three acres of land holden in chief, and make a feoffment of all, to the use of

<sup>(</sup>a) 6 Rep. 17 a.

<sup>(</sup>b) Hob. 159, 160.

such person and of such estate as he shall give or dispose by his will, and after by his will gives and devises all his lands to J. S., and his heirs, that this shall carry but two parts of the lands in point of devise; and lastly, where an interest and authority meet, if the party declare clearly that his will is, that this act shall take effect by his authority or power, there it shall prevail against the interest; for modus et conventio vincunt legem. And, therefore, in the same case of Clere, it is agreed, that if the devisor had recited his power, and had relied upon that, all would have passed by express declaration of the party himself; nay more, though the party do not make an express declaration, yet if his act do import a necessity to work by his power, or else to be wholly void, the benignity of the law will give way to effect the meaning of the party; and therefore, in that case, it was resolved, that whereas Clere was seised, for example, of three acres of land, every one of equal value, and conveyed two of them to his wife for her jointure, and afterwards made a feoffment of the third to the use of such person, &c., as before, and then devised that third acre ut supra, that devise was good by force of the authority, for else the whole devise had been utterly void, having before given the other two parts to his wife."

In more modern times, the rule has been expressed by Lord Thurlow as follows:—"To execute the power, it must be impossible to impute to the testator any other intention than that of executing it." The doctrine, he says, is not by any case carried further than this. The distinction most frequently occurring, and which serves for illustration, as well as application of the rule is this:—If a will contain a devise of all the testator's lands generally, and he has some lands on which the will may work by his interest, the law will attribute the will to his interest, and land of which he has only a power to devise, will not pass. So, if the will be of all his lands in a county or place named, and he has lands of his own therein. On the other hand, if the testator has no lands, or none in the

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county or place named, upon which the will may work by his interest, there the law will attribute the will to his power, because if that be not done, the will is void either wholly, or so far as respects the county or place named. In the case now before the Court, the testatrix has not referred to her power, and she had lands in the county of Surrey, upon which the will may work by her interest, namely, the other moiety of the tenements in question; and therefore, if there were nothing more in the case, it seems very clear, that the law could not attribute the will to the power, nor infer that she intended to execute the power. It remains then to be considered, whether there be any thing more, either apparent upon the will, or as facts existing dehors the will, from which it can be satisfactorily and safely inferred, that she intended to execute her power. The will contains in itself an injunction on the devisee, to keep the devised estates in repair. The facts existing dehors the will are these:-The estates had originally belonged to the father of the testatrix. One moiety had descended upon her, and another upon her sister Roake. The two sisters and their husbands had settled their moieties in such a manner, as to give the moiety of either who might die without issue, to the issue of the other, subject to a power to each to make a different disposition of her moiety, by deed or The sister of the testatrix left issue, from whom the testatrix purchased the sister's moiety, and thus became seised of one moiety in fee, and another for her life, with a power to dispose of the fee of the latter majety. The question then is, whether from these matters, it can be safely and clearly inferred, that the testatrix intended to execute her power. Now it appears by the will, that the testatrix had estates in London, or at least, supposed she had, and made her will upon that supposition; and we see nothing repugnant to reason, or to the ordinary sentiments and intentions of mankind, in supposing that a person having estates in London, and an undivided moiety only of estates in Surrey, might make a will con-

taining such an injunction as the present, leaving that injunction to take effect as far as by law it might; and even if it should be inferred from this part of the will. that the testatrix meant thereby to give the entirety of the lands in Surrey, still it will not necessarily follow that she intended to execute her power, and this for the reason hereafter mentioned. So, if the extrinsic facts should lead to an inference, that the testatrix cannot have intended to make a strict settlement of the purchased moiety upon the family of her sister, and leave that which was originally her own, unsettled and undisposed of; still, in our opinion, it will not necessarily follow that she intended to execute her power. It may be, that she intended her will to work by her interest in the tenements. It may have happened, that she had entirely forgotten the settlement, and supposed at the time of making of her will, that she was then seised of the entirety of the estates in fee, as but for that settlement she would have been. settlement was made in the life of her first husband, thirtythree years before the date of her will. The only fact upon the special verdict, shewing that this settlement was ever thought of, in the interval, is the release under which she purchased her sister's moiety in 1775, by which that moiety was conveyed for the purpose of suffering a reco-This took place eight years before the date of her will, and no recovery was suffered till after her death, though she lived eleven years, and must have been in possession of this moiety for nine years; the tenant for life, her sister's husband, having died in 1775. It appears to us to be at least as probable, that she had forgotten the settlement, and intended the will to work by an interest, as that she intended to execute the power contained in the settlement; and even more probable, because the language of the will is exactly such as would be used by a person who, at the time, supposed herself to have an estate in fee in the entirety of the tenements, and not such as would be used by a person who was conscious that she had a

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Judgment reversed.

Tuesday, 13th June.

In case against carriers for the loss of goods delivered to them in Ireland, to be conveyed to England, the question was, whether the importation of the goods was illegal, unless they had been entered at the customhouse:--Held, that as illegality can never be presumed, it lay upon the carriers, who question, to prove that the

goods had not

been entered.

## Sissons v. Dixon and others.

DECLARATION in case. The first count charged the defendants, as common carriers between Dublin and Liverpool, with the loss of a parcel delivered to them at Dublin, by the plaintiff, to be safely carried to Liverpool. second count charged the defendants as warehousemen. The third count was in trover. Plea, not guilty, and issue thereon. At the trial, before Hullock, B., at the Lent assizes for Lancashire, 1826, the short case was this. plaintiff was a lace manufacturer at Liverpool, and the defendants were the proprietors of the St. George steam packet, residing at Dublin, and carrying passengers and parcels from thence to Liverpool and back. The plaintiff, being at Dublin, in the course of a journey in the way of his business, delivered the parcel in question, containing a quantity of lace, to the servants of the defendants at their warehouse, to be forwarded by their packet to Liverpool. The parcel never reached its destination. No evidence was given that the parcel was entered at the oustom house, as goods imported from Ireland, which it was contended for the defendants it ought to have been, pursuant to the

statute 46 Geo. 3, c. 87, s. 1. The learned Judge reserved that point, and the plaintiff obtained a verdict for the value of the lace, with leave to the defendants to move to enter a nonsuit.

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## J. Williams, last term, obtained a rule nisi accordingly, against which

Henderson now shewed cause. The 46 Gen. 3, c. 87, s. 1, by the provisions of which it was contended at the trial, that the goods in question ought to have been entered as goods imported from Ireland, has been superseded by the 4 Geo. 4, c. 72, ss. 6, 7; because the lords of the treasury had exercised the powers given them by the latter statute previous to the date of this transaction, and had made the trade between the Irish and English ports, a coasting trade; which is proved by The Gazette, dated 25th September, 1824. It follows, therefore, that the only things now required to be entered, are those which are liable to pay a duty; and the question is, whether the lace, sent by the plaintiff under such circumstances from Dublin to Liverpool, was liable to pay a duty. Now, upon the evidence in the case, it must be presumed that the lace was of the plaintiff's own manufacture, and had been by him imported into Ireland; and if so, it was, under the 56 Geo. 3, c. 83, s. 3, entitled upon its re-importation to a drawback equal to the duty, and consequently required no entry. But, assuming an entry to have been necessary, still the contract made between the plaintiff and the defendants was not void, because there was no evidence of any fraudulent intention, or of any collusion to evade the payment of any duty to which the goods might be liable; Catlin v. Bell (a). It was urged at the trial, that the plaintiff ought to have proved the entry of the goods, (supposing an entry to have been necessary), but that is a mistaken argument, and contrary to all the principles

Sissons v. Dixon. of the law of evidence; for the Court will not presume that the plaintiff has acted illegally, but, on the contrary, in the absence of positive proof of fraud, they will presume that he has conformed to the law, and has acted bonâ fide. Williams v. The East India Company (a), Pearce v. Whale (b). Upon the whole, therefore, it seems clear that this objection is unfounded, and that the plaintiff is entitled to retain his verdict.

J. Williams, in support of the rule. The contract between the parties in this case was clearly illegal and void. It was contrary to the spirit and policy of an act of parliament; it had a tendency to defraud the revenue; and it cannot be enforced in a court of law. Law v. Hodson (c), and Ribbans v. Crickett (d), are authorities in point. It is admitted, that the lace, if manufactured in Ireland, and imported from thence to England, would have been liable to pay duty; but it is said, that it must be presumed to have been first imported into Ireland, and from thence re-imported into England, in which case it is entitled to a drawback equivalent to the duty. But there was not a tittle of proof upon that point, and it is by far too violent a presumption for the Court to draw. Indeed, the presumption was rather the other way; for the plaintiff, the supposed importer, was not himself a passenger by the packet: and there was nothing to shew, either that duty had been paid on the one hand, or a drawback claimed on the other. [Bayley, J. If proof upon that subject was necessary, did not the onus probandi lie on the defendants? They are the persons who raise the objection, therefore they are the persons to support their own objection, by shewing that a duty was payable, and that Holroyd, J. The plaintiff proved a it was not paid. primâ facie case of liability in the defendants, by proving the mere delivery of the goods to them; then, if that lia-

<sup>(</sup>a) 3 East, 192.

<sup>(</sup>c) 11 East, 300.

<sup>(</sup>b) Ante, vol. vii., 512; 5 B. & C. 38.

<sup>(</sup>d) 1 Bos. & Pul. 264.

bility was to be removed by shewing the agreement to be illegal, surely the onus, in that respect, lay on the defendants]. It is submitted, that the onus lay upon the plaintiff; he was to make out his own case: and without shewing that the transaction was within the law, he made out no case at all.

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BAYLEY, J.—I am clearly of opinion, that this rule ought to be discharged. It was incumbent on the defendants to shew that the transaction was illegal. The law always presumes that a party has acted legally and bonâ fide, until the contrary is shewn. It was extremely easy for the defendants in this case to have proved the alleged violation of the law by the plaintiff, if the facts would have borne them out; and as no evidence was adduced that the goods were not duly entered, it must be presumed that they were so, and that ground of defence fails alto-Bennett v. Clough (a), is extremely similar to the present case. There, a parcel containing bank-notes. stamps, and a letter, was sent, by a carrier, from one stamp distributor to another, and lost. In an action against the carrier, it was held, that the fact of the letter accompanying the stamps, was prima facie evidence that it related to them, so as to bring the case within the proviso of the 42 Geo. 3, c. 81, s. 6; which enacts, that the prohibition to send letters otherwise than by the post, shall not extend to letters sent by carriers with goods, for the purpose of being delivered with the goods to which the letters relate; and that, as illegality could never be presumed, and the defendant did not prove the letter not to relate to the stamps, he was liable for the value of the parcel. The proof required of the defendant there, was less easy of production than in the present case; that, therefore, seems to me a stronger case than this.

HOLROYD, J., concurred.

Rule discharged.

(a) 1 B. & A. 461.

Wednesday, 14th June. The MASTER, WARDENS, ASSISTANTS, and FELLOW-SHIP of the COMPANY OF TOBACCO-PIPE MAKERS, of the Cities of London and Westminster and Kingdom of England, and Dominion of Wales v. John Woodroffe.

Where a person has been admitted a member of a corporate Company, and has acted as such, it is not competent to him in an action for infringing the bye laws, to dispute the acceptance of the charter by a majority of those whom it intended to

incorporate. The charter oftheTobaccopipe Makers' Company of London, professes to operate upon all the tobaccopipe makèrs throughout the kingdom: -Held, first, that assuming the charter could not by law have so

extensive an

THIS was an action of debt brought by the plaintiffs to recover from the defendant a certain fine of 61. 13s. 4d., and certain penalties alleged to have been incurred under the bye laws of the company of Tobacco-pipe Makers. The declaration set forth the charter of Charles 2, to the company, hereinafter stated, and their acceptance of that charter, by which they were empowered to make bye laws; and also certain bye laws under which the fine and penalties have become due, as they allege; and the plaintiffs claimed, in the first count, the sum of 21. 16s., being twice the amount of fourteen quarterly payments due under the 15th bye law; in the subsequent counts up to the 25th count inclusive, the sum of 2s. in each count, amounting in the whole to the sum of 21.8s., for nonattendance in pursuance of the 5th bye law; and in the last count, the sum of 61. 13s 4d. under the 10th bye law, in consequence of the defendant's refusal to accept the office of warden. Plea, nil debet, and issue thereon. At the trial, before Abbott, C. J., at the London adjourned Sittings after Hilary term, 1825, a verdict was taken for the plaintiffs, for the above mentioned fine and penalties, subject to the opinion of the Court upon the following case.

operation, it was competent to bind such tobacco-pipe makers as were admitted members of the Company, and had acted under the charter; and second, that the charter, in fixing the place of meeting for the Company within the city of *London*, or within three miles thereof, established such local limits as are requisite in such a charter.

Bye laws for compelling, by means of pecuniary penalties, the attendance of members of a corporation, at corporate meetings, and the acceptance of corporate offices, are

reasonable, and may be enforced by action at law.

But a bye law, imposing a tax on the members of a corporation by the name of quarterage money, cannot be supported, unless it is shewn that the necessities of the Company require such contributions, and that the latter are commensurate with the former.

By charter or letters patent of 15th Charles 2, that king did among other things, will, ordain, constitute, grant, and declare, that his subjects, the tobacco-pipe makers, within his cities of London and Westminster, and his kingdom of England, and dominion of Wales, and every of their apprentices whatsoever, when they should have served as apprentices in and unto the said art, mystery, or trade, by the space of seven years, at the least, and all and every other person and persons who had served as apprentices to the said trade, or had used the said trade, by the space of seven years, and all others which thereafter from time to time should be admitted and made free of the said society, in such manner as thereafter in those presents was declared and specified, should be from thenceforth for ever thereafter, one fellowship and body corporate and politic, in deed and in name, by the name of the Master, Wardens, Assistants, and Fellowship, of the company of Tobacco-pipe Makers, in his said cities of London and Westminster, and his kingdom of England, and dominion of Wales, and them by the said name of master, &c., one body politic and corporate, really and fully, for him, his heirs and successors, he did erect, ordain, make, and create, by those presents; and that by the same name they should have perpetual succession; and that they and their successors by the said name be, and should be for ever, persons able and capable in law to have, take, hold, purchase, receive, possess, and enjoy. as well any manors, lands, tenements, liberties, franchises, rents, reversions, and other hereditaments, in fee, or for life, lives, or years, or otherwise, not exceeding the yearly value of 40l. per annum, to them and their successors, as also goods, chattels, and other things whatsoever, and the same lands, &c., chattels, and other the premises, and every part and parcel thereof, to demise, grant, let, set, assign, and dispose at their will and pleasure, and to make, seal, and accomplish, all deeds, evidences, and writings, of, for, and concerning the same, or any part or parcel

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thereof; and that by the same name they should and might be persons able and capable in law to plead and be impleaded, to answer and be answered, defend and be defended, in any of his courts and other places whatsoever, and before any judges, justices, or other person or persons whatsoever, in all and all manner of suits, complaints, pleas, causes, matters and demands whatsoever, of what nature, kind, or form, soever, as other his liege people of that his kingdom of England, &c. And that they should and might have for ever a common seal, for them and their successors, to serve for the ensealing, doing, and confirming of all and singular their causes, affairs, matters and business touching or concerning the said society, and that it should and might be lawful to and for them and their successors, the same seal at their will and pleasure from time to time to break, deface, alter, and make new, as to them should seem most meet and convenient. said king did further will, and for him, his heirs, and successors, did grant and ordain by those presents, that from thenceforth for ever there be, and should be, one master, four wardens, and fifteen or more assistants of the said. society, to be constituted and chosen in such manner and form as thereafter in those presents was expressed and specified. (Then followed the appointment of the first master, by name, for one year; of the first four wardens, by name, also for one year; and of the first fifteen assistants, by name, for life). And further the said king, for him, his heirs, and successors, did thereby ordain, that from and after such time as the said (first master) should have served in the said office of master of the said society during the time before limited, then, the wardens and assistants of the said society for the time being, or the greater part of them, for that intent or purpose being assembled, at or in a meet house or hall, to be by them for their use purchased or provided, within his said city of: London, or three miles of the same, should within convenient time nominate, elect, and chuse a fit and sufficient

person, who hath formerly been one of the wardens of the said society, to be master of the said society, and so the TOBACCO-PIPE master for ever thereafter to be annually elected and chosen to the said office of master upon the 25th March, and so from thence to continue for one whole year then next following, and until some other should be elected And further the said king did will and grant that the said master, wardens, and assistants, or the greater part of them, from and after the 25th March. A. D., 1664, should and might, yearly and every year, on the 25th March, if it be not Sunday, or if Sunday, then the next day after, at the hall or place of meeting and assembly, nominate, elect, and chuse, out of the said assistants, four that should be wardens of the said society. which said wardens should be and continue wardens of the said society until the end and term of one whole year then next ensuing; and from thence until some other meet persons should be elected and chosen into the said office of wardens as aforesaid, &c. And further, the said king did by those presents, for himself, his heirs and successors, ordain and appoint, that if any of the said assistants should die, or be removed from his or their office or place of assistants for some reasonable cause; that then, and so often, it should be lawful to and for the said master, wardens, and assistants, or the greater number of them, to chuse and make one, or more, other meet person or persons of the said society, to be assistant or assistants And further, the said king of the said society, &c. willed, and by those presents for him, his heirs, and successors, did grant to the said master, wardens, assistants, and society, and their successors, that it should and might be lawful to and for the said master, wardens, and assistants for the time being, or the greater part of them, from time to time, to set, or impose, a reasonable fine, mulct, and sum of money, not exceeding the sum of 10%, upon all and every such person and persons as shall be at any time thereafter elected or chosen to the said

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several offices or places of master, warden, and assistants, or any of them, as aforesaid, and shall refuse to undergo and accept the same; and the same fine, mulct, or sums, from time to time so to be imposed, to levy, perceive, and take, by way of distress and distresses of the goods and chattels of the person and persons so refusing, as aforesaid, or otherwise, by any other lawful ways; and the same to receive and keep to the use of the said master, wardens, assistants, and society, and their successors. said king, of his further grace willed, and by those presents, for him, his heirs, and successors, did grant to the said master, wardens, and society, and their successors, for ever, that it should and might be lawful to and for the said master, wardens, and assistants, and their specesors. or the greater number of them, when and so often as it shall seem needful and expedient, to assemble, convocate. and congregate themselves together, at or in their hall or place thereinbefore mentioned, and there, from time to time, and at all times convenient thereafter, to treat and consult of, determine, constitute, ordain, and make, any constitutions, statutes, laws, ordinances, articles, and orders whatsoever, which to them, or the greater number of them, should seem reasonable, profitable, or requisite for. touching, or concerning the good estate, rule, and government of the said master, wardens, assistants, and society. and every member thereof, and in what order, or manner. the said master, wardens, assistants, and society, and all and every other person or persons, using or exercising the art or mystery of making tobacco-pipes, within the said cities of London and Westminster, of the said king, and any other parts or places within that his realm of England, or dominion of Wales, should demean and behave themselves, as well in all and singular matters, causes, and things, touching or concerning the said art or mystery of making, burning, or baking of tobacco-pipes, or any thing thereunto appertaining, as also in their several offices, functions, mysteries, and businesses, touching or

concerning the said society, as aforesaid, and all and singular such pains, penalties, and punishments, by fines and amerciaments, or by any of them, against or upon any offender or offenders, which should transgress, break, or violate the said constitutions, laws, statutes, articles, or ordinances, to be made, ordained, and established, or any of them, to provide, impose and limit, and the same, and every parcel, to ask, levy, take, and receive, by way of distress, or otherwise, by any lawful ways or means, of or against the offender or offenders, his or their goods and chattels, or any of them, as the same should require. as to the master, wardens, and assistants of the said society, or the greater part of them, for the time being, should seem convenient and expedient: all which laws, ordinances, constitutions, orders, and articles, so to be made, ordained, and established, and every of them, the said king willed, and by those presents, for him his heirs, and successors, did grant and command to be from time to time, and at all times, observed, obeyed, and performed in all things, as the same ought to be, under the reasonable pains, penalties, forfeitures, and punishments in the same to be imposed, provided, inflicted, and limited; so as the same laws, statutes, articles and ordinances, pains, penalties, forfeitures, fines and amerciaments, or 'any of them, should not be repugnant or contrary to the laws and statutes of that his realm of England, or prejudicial to the customs of that his city of London.

On the trial of the cause, it was objected for the defendant, that evidence ought to be given, that the charter had been accepted by a majority of those whom it intended to incorporate. Whereupon, it having been proved that the defendant had been admitted a member of the company, and had acted as such, and that quarterage and other dues had been received from tobacco-pipe makers in different parts of *England*, ever since the granting of the charter; the Lord Chief Justice stated, that it was not for the defendant to dispute the acceptance of the charter;

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TOBACCO-PIPE MAKERS' COMPANY v. Woodroffe. and his Lordship left it to the jury upon this evidence alone, as to the point of acceptance, that it was complete and conclusive evidence as against the defendant, that the charter had been accepted, and the jury accordingly found the fact to be so. It is, therefore, and under these circumstances, and for this reason alone, stated as a fact in this special case as against the defendant, that the tobacco-pipe makers of the cities of London and Westminster, and kingdom of England, and dominion of Wales, accepted the said charter, and have ever since acted thereunder, and duly paid into his Majesty's Exchequer the yearly rent or sum of four nobles (11.6s.8d.), stipulated by the said charter to be annually paid by them into the said Exchequer.

On the 30th August, 1820, at a meeting of the master, wardens, and assistants of the said company, duly assembled for that purpose at the Guildhall of the city of London, the following bye laws were duly ordered, ordained, established and declared; which bye laws the defendant took an active part with the committee of the said company in forming and passing, and signed the same as one of the assistants of the said company, together with a petition to the Lord Chancellor, the Lord Chief Justice of the court of King's Bench, and the Lord Chief Justice of the court of Common Pleas, to examine, approve, and sign the same.

(The petition, and the bye laws, forty-five in number, and signed and approved, pursuant to st. 19, Hen. 7, c. 7, by the Lord Chancellor and the two Chief Justices, were here set out at length: but as the decision of the case applied only to the three bye-laws declared upon, namely, the fifth, the tenth, and the fifteenth, it will be sufficient here to set out those only).

Fifth. Also, it is ordered, ordained, established, and declared, that the master, wardens, and assistants of the said company shall likewise, upon notice or warning to him or them given, or left at his or their usual place or

places of abode, personally appear at all other courts to be holden for the said company, at such place of meeting TOBACCO-PIPE to be appointed as aforesaid, unless he or they be hindered by sickness, being in prison, or beyond the seas, or by the King's service, or have some other reasonable cause, to be allowed by the master, wardens, and assistants for the time being, or the greater part of them; upon pain of forfaiting for every default the sum of 2s.; and if he shall not appear at the hour, to be appointed by the master and wardens for that purpose, to pay the sum of 6d. for every default; or if he shall leave the court without license of the master, to pay the sum of 6d. for any time he shall so effend: the said several sums to be paid to the said company, for the use thereof.

Tenth. Also, it is ordered, ordained, established, and declared, that if any person who shall be chosen master of the said company, and liable by the charter thereof to serve the said office, shall refuse to undergo or accept the same, or to take the oath of office appointed by these ordinances for him to take, such last-mentioned person, for every such refusal to undergo or accept the said office, or to be sworn in form aforesaid, shall forfeit and pay to the said company, for the use thereof, the sum of 10/,; and that if any person who shall be chosen to be a warden of the said company, shall refuse to undergo or accept the said office of warden, or to take the oath appointed to be administered unto him in that behalf, every person so refusing to undergo or accept the same office of warden, or to take the oath aforesaid, shall forfeit and pay to the said company, for the use thereof, the sum of 61, 13s. 4d.; and that if any person who shall be chosen to be one of the assistants of the said company, shall refuse to undergo or accept the said office of assistant, or to take the oath appointed to be administered unto him in that behalf, every person so refusing to undergo or accept the said office of assistant, or to be sworn in form aforesaid, shall forfeit and pay to the said company, for the use thereof, the sum of 51. 6s. 8d. sterling. 2 N 2

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Fifteenth. Also, it is further ordered, ordained, established, and declared, that, as well every freeman and brother of the said company, within the cities of London and Westminster, and any other parts or places within the kingdom of England, and dominion of Wales, as limited by the said charter, either using or not using the said art, mystery, or trade of making tobacco-pipes, shall pay yearly, by the name of quarterage-money, to the master and wardens of the said company for the time being, to the use of the said corporation, the sum of 8s. yearly, which shall be paid quarterly, by equal portions; and every journeyman, or journeywoman, of the said company, who shall be kept or set on work by or with any member or members thereof, shall pay 4s. yearly, at the four quarterly days aforesaid, by equal portions, to the said company, for the use thereof: and the same quarterages shall be paid at the said quarterly assemblies in the place of meeting aforesaid, upon pain that every person refusing or neglecting to pay his or her quarterage at the said quarterly courts, or to the renter warden, within the space of ten days after any of the said quarterly meetings, according to the rates aforesaid, shall forfeit and pay twice so much as shall be at any time in arrear and not paid, to the master and wardens for the time being, or some of them.

The defendant is a tobacco-pipe maker, carrying on business in Old Street, and at Vinegar Yard, Belton Street, Bloomsbury, both in the county of Middleser. On the 7th January, 1812, at a court of the company, duly holden, the defendant was admitted and sworn into the freedom of the said company; since which he has frequently attended the meetings of the said company, held under the said charter and bye laws. At a court of the said company, duly holden, on the 25th March, 1813, the defendant was duly chosen steward of the said company, and served that office; and at another court of the said company, duly holden, on the 25th March, 1814, the

defendant was duly elected one of the assistants of the said company; and at the next court of the said company, duly holden, on the 3d May, 1814, the oath required to be taken by assistants was taken by him, and he was duly sworn in as such, and paid the freeman's quarterly money, then due from him, and the usual fees on swearing in a member one of the assistants of the said company. the 10th January, 1816, the defendant sat and acted as one of the assistants, and continued to sit and act as an assistant from that time, until March, 1823, and at many subsequent courts, and during those periods took a great interest in the affairs of the company. At a general court of the said company, duly holden, on the 25th March, 1823, at which the defendant was present, he was duly chosen warden of the said company, of which he had notice, but refused and neglected to take upon himself the said office. Prior to the year 1820, the defendant had frequently paid the quarterage money mentioned in the 15th bye law; but from Michaelmas 1820, to Christmas 1823, the defendant, being all that time a freeman, and one of the assistants of the said company, has neglected to pay the quarterage, the same having been duly demanded of him. The several courts stated in the second and subsequent counts of the declaration, were duly holden, at which the defendant was summoned to attend, but neglected to do so.

F. Pollock, for the plaintiffs. Three objections will be taken to the right of the plaintiffs to recover in this case. First, that the charter is void, as being a grant of more than the crown has power to grant. Second, that the whole code of bye laws is illegal and void. Third, that the three particular bye laws upon which the action is founded, namely, the fifth, tenth, and fifteenth, are illegal and void. First, the charter is not void, for the powers granted by it are within the prerogative of the crown to grant. The extent of those powers is certainly considerable, and if they

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were of an exclusive nature, that is, if they operated to narrow or restrain the exercise of the particular trade, a grant of them might be argued to be void; but their effect is directly the contrary, namely, to include all persons exercising the trade, and to promote the interests and the extension of the trade at large. Such a charter is not without an authority to support it. In The Butchers' Company v. Morey (a), it was held, that a power granted by charter, to a company exercising a particular trade, in a certain place, to make bye laws for the government of all persons exercising that trade in that place, enabled them to make bye laws binding on persons so exercising the trade, who were not members of the company, as well as those who were, which is going further than the charter in the present case goes, which is confined expressly to those who The extension of the comare members of the company. pany's power over the cities of London and Westminster, the kingdom of England and the dominion of Wales, is no objection to the validity of the charter, for such an extension was necessary for the accomplishment of the objects which the charter had in view, namely, to prevent the importation of foreign tobacco pipes, to promote the exportation of English tobacco-pipe clay, and to provide for the preservation of timber, by burning tobacco pipes with coal instead of wood; all which are in pursuance of law, and in aid of trade. It was urged at the trial, and may, perhaps, be re-urged to day, that the acceptance of the charter by the whole of the body corporate ought to have been proved: the finding of the case, however, is a sufficient answer to that objection; for nothing could be more correct than the direction of the Lord Chief Justice on that point to the jury, namely, that it was not for the defendant, who had acted under the charter, to dispute its acceptance, at least by himself. Second, the bye laws are not illegal, or void, as a code. The charter being valid, the bye laws are made under a competent authority; their

object, as a code, is beneficial to the public, and not subversive either of the common or statute law of the land: TOBACCO-PIPE consequently, even if some of them are void in themselves, that will not render the others void, or vitiate the whole as a code. Third, the three particular bye laws upon which the action is founded are clearly good in themselves; and if either of them is good per se, and not vitiated by the invalidity of any of the others, which it has already been submitted it cannot be; then the action is maintainable. The fifth, which provides that the master, &c. shall, upon summons, attend all courts, and not depart without license, upon pain of a fine, is a mere provision for the internal regulation of the society; perfectly legal in itself; and clearly binding upon the defendant as a member. The tenth, which imposes a fine upon every person refusing the office of master, &c., is of the same character, and admits of the same vindication as the fifth; for though the word person is there used, that cannot mean persons not members of the society, because by the terms of the charter the officers must be chosen out of the members: the word person, therefore, must be read member, and then this bye law becomes wholly unobjectionable. The fifteenth, which imposes upon the members of the society, and their journeymen, the payment of a quarterage, is good for the reasons given with reference to the fifth and tenth, at least so far as regards the members themselves. Perhaps in extending that payment to the journeymen, this bye law may go too far; but still, as one bad bye law in a code will not vitiate one that is good, so, upon the same principle, part of a bye law being bad, will not vitiate another part which is good: and as this action is brought against a member, it is founded upon the part of the bye law which is good, and therefore the objection in that respect fails. Besides, this bye law speaks of journeymen of the said company, and they, looking to the scope of the charter, must themselves be regarded as members.

George, contrà. This action is not maintainable.

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objections to it have been correctly stated to the Court; and they are all fatal to the plaintiffs' right to sue. First, the charter is void, for the crown cannot create a corporation armed with powers in restraint, or even in regulation of any common trade or calling, extending, as the powers of this corporation do, through the whole realm of England and Wales. The existence of such a body is anomalous, and at variance with any correct idea of a corporation, which supposes a body existing in, and confined in its powers to, a particular place, and which must not extend over the kingdom at large The only reported case at all approaching to the present, is that of Hayes v. Harding (a). There King Charles the first had by letters patent, ordained that there should be in England and Wales, one society or body corporate of soap makers, and that none, not free of that society, should use that trade, on pain to forfeit all the soap they should make. But the report does not shew that the court came to any decision in the case: and if it had established such letters patent the case could hardly be deemed an authority now. There are, indeed, instances of corporations, such as the College of Physicians, whose powers, in some respects, do extend all over England: but their charters have been confirmed by act of parliament: without which, it is clear that they would have been void. Besides, the charter of the College of Physicians, does not, like the charter in question, relate to the exercising or carrying on of a common handicraft occupation or calling, by which a man is to gain a livelihood by the labour of his hands. And even supposing that, by the custom of a particular place from time immemorial, which is of higher authority than any bye-law, merely founded on a charter issuing from the crown, a man may be lawfully prohibited from exercising, or be subjected to restraints, and exposed to penalties in the exercise of a handicraft trade, mystery, or manual occupation in the particular place, tobacco-pipe making cannot be subjected to any such prohibition, restraints, or penalties in any place, because tobacco and

tobacco-pipes, were first known long within the time of legal memory. If such a charter in relation to tobaccopipe making can be good, so would a charter granted at the present time, for subjecting to regulations, restraints and penalties the working with a plough, or a spade or a scythe, or the following of any other mode of earning a livelihood by daily labour. Again, every charter must by law be accepted by the majority of persons to whom it is directed. But how and when were all the tobacco-pipe makers in every part of England and Wales to meet together for this purpose? Such a meeting was not only necessarily impracticable, but the object for which it would have had to assemble together, would have been such as could only be lawfully effected by an act of parliament; namely, to prescribe, in one form or another, rules of conduct to be observed by a whole class of the king's subjects throughout the kingdom; which is in effect to make a law on a particular subject for the whole kingdom. Nor would it be a sufficient answer, to say that the laws would only be bye No charter, granted by the crown, can authorise the making of bye laws extending all over England; for a bye law, in its nature, nay even by its very name, means a law limited to a particular district. Jacob, in his Law Dictionary, derives the word bye-laws from two Saxon words, By, pagus, civitas, and Lagen, which he translates, laws of cities; and he refers to Spelman v. Bellagines, as his authority: and all the writers upon the subject agree in describing a corporation as limited in all respects to a particular district: 10 Rep. 32, 6; 1 Rol. Abr. 512, Corporations, (D). 1, 2; Sir T. Jones, 168. land," says Jacob (a), "those laws are called laws of birlaw, or burlaw ( or perhaps burgh law, synonimous with the English borough-law), which are made by neighbours elected by common consent in the birlaw-courts, wherein knowledge is taken of complaints betwixt neighbour and neighbour; and birlaws, according to Skene, are leges rusticorum, laws made by husbandmen, or townships, con-

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<sup>(</sup>a) Law Dictionary, tit. Bye Laws.

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cerning neighbourhood amongst them." And he cites Skene, page 33. The grant of a charter by the crown is not valid at all except as an exercise of the royal prerogative; and that has always been held to be very limited, where the public right of trade is concerned, and certainly not to extend to cases where the object of the charter is to restrain trade. Com. Dig. Prerogative. Com. Dig. Trade (A. 6), (D. 1), (D. 4); 2 Inst. 533; 8 Rep. 125; 12 Rep. 12; 1 Rol. Abr., Bye Laws; and various other authorities which it is superfluous to enumerate, as they will be found referred to in some or other of those already mentioned. Second, these bye laws are illegal and void, as a whole. True it is, that in a code of bye laws some may be good, though others are bad; but in considering whether the code, as such, is good or bad, the object of it must be looked at. Now, in looking through these bye laws, it is apparent that the main object in view was that of extracting money from a certain class of the King's subjects resident throughout England, on idle, frivolous and false pretences; which is an illegal object; and as that appears upon the face of the majority of them, it must have the effect of vitiating the whole. A very cursory view of these bye laws will shew how extremely unconstitutional and unjust most of them are, and that taking them altogether they are merely extortionate in their design and operation. The third extends to meetings of the society held within 20 miles of London, whereas the charter limits their meetings to a distance of three miles from Loridon. The 12th, 13th, 14th, 16th, 17th, and 44th. impose fines, not only upon the members of the society, but upon any other persons using the trade. The 18th imposes a fine upon apprentices neglecting to become freemen. The 21st and 22nd extend their operation to foreigners. The 23rd restricts persons using the trade from instructing others who are not freemen. The 24th, 25th, and 26th, interfere with private arrangements and agreements between masters and their apprentices. The 32nd empowers the master and wardens to search the premises of persons

using the trade. The 34th makes it obligatory on persons using the trade to become members of the society. 35th imposes an oath upon persons not members of the society. The 39th is in direct contravention of the law of the land respecting hawkers and pedlars. The 41st imposes a penalty larger than any limited by the charter. The 42nd is in direct encouragement of the offence of maintenance. The 43rd, which prohibits any other fuel than coal to be used in the trade, is a law impossible to be obeyed in many parts of the kingdom. Others might be pointed out equally objectionable, and the result of a more minute examination would be, that a majority of these bye laws are clearly illegal; some as being in direct violation of the chatter; others, as being opposed to the settled law of the land; and all as being penned in a spirit, and possessing an operation, inconsistent with the presperity and freedom of trade, and the liberty of the subject. Third, two out of the three particular bye laws declared upon, are illegal and void; namely, the 10th and the 15th: the remaining one, the 5th, taken by itself, could not, perhaps, be justly impugned. The 10th imposes a penalty upon any person who shall refuse to accept the office of master, warden, or assistant of the company, and is therefore clearly void; because, though by the charter the master must be chosen out of the wardens, and the wardens out of the assistants, still there is no regulation as to the election of assistants, except that they are to be members of the society: and as the whole trade are declared members, the society, when their funds are low, have only to elect, seriatim, 50 or 100 persons living at a distance of 200 or 300 miles from London, and who they know, for that reason, must and will refuse the office, in order, by means of this unrighteous bye law, to raise a large sum of money. The word person cannot be read member, and a bye law that any person elected into an office, who refuses, shall forfeit 101., will be void: for thereby a stranger elected shall forfeit. 3 Lev. 294. Com. Dig. Bye Law, (C.2). This latter part of this bye law

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therefore, is clearly void; and as it is an entire bye law, being void in part, it is void in toto. Com. Dig. Bye Law, (C. 7).

The Case was argued at the Sittings in Banco after Michaelmas term, 1825, when the Court took time for consideration. Judgment was now delivered by

ABBOTT, C. J.—The charter in this case professes to incorporate the tobacco-pipe makers within the cities of London and Westminster, the kingdom of England, and dominion of Wales; every person who has served seven years as an apprentice to the trade of a tobacco-pipe maker; and all other persons who should be admitted and made free of the company; and after naming the first master, wardens and assistants, provides for the election of future masters, who are to be annually chosen by the wardens and assistants for the time being, or the greater part of them, for that intent or purpose being assembled at or in a meet house or hall, to be by them for their use purchased or provided within the city of London, or three miles of the same. The charter also gives the master, wardens, and assistants, power to assemble at, or in their hall, or place of assembly, and there make bye laws for the rule and government of their society, and every member thereof, and of all and every other person or persons using or exercising the art or mystery of making tobacco-pipes within the cities of London and Westminster, or any other parts or places within the realm of England or dominion of Wales.

Two objections were made to this charter; first, that it professes to operate upon all the tobacco-pipe makers throughout the kingdom, which it was contended it could not do without the sanction of an act of parliament; and second, that in order to give validity to such a charter, it ought to be confined in its operation to some local limit named in the charter itself. As to the first objection, (without professing to decide whether the charter operates upon all tobacco-pipe makers throughout the kingdom), it

is sufficient for the purposes of the present case to say, that the charter may be, and is, competent to bind such tobacco-pipe makers as are admitted members of the company, and have acted under the charter. We also think the answer to the second objection is, that this charter, in fixing the place of meeting for the company within the city of *London*, or within three miles thereof, establishes such local limits as are requisite in such a charter.

Our next consideration is, as to the validity of the bye laws sought to be enforced in the present case. objects of the 5th and 10th bye laws respectively set out in the case, are, first, to compel the due attendance of members of the corporation at corporate meetings; and second, to compel the acceptance of corporate offices: and with these objects in view, we think no exception can be taken to these bye laws, inasmuch as attendance at corporate assemblies, and the acceptance of corporate offices, are duties that every member owes to the corporation to which he belongs. There appears to us to be no objection to the manner in which these bye laws are worded. The fifth appears to be free from all objection. It requires the attendance of the master, wardens, and assistants, at corporate meetings, at the peril of paying the fines therein mentioned. The tenth is more general. It is by that ordained, "that if any person who shall be chosen to be a warden of the said company, shall refuse to undergo or accept the said office of warden, or to take the oath appointed to be administered unto him in that behalf, every person so refusing to undergo or accept the same office of warden, or to take the oath aforesaid, shall forfeit and pay to the said company for the use thereof, the sum of It was urged, in the argument for the defendant, that the word "person," as used here, will include persons who are not liable to serve the office of warden, and consequently that this bye-law is void;

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and for this The Mayor of Oxford v. Wildgoose (a), was

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on the present occasion. There the objection does not appear to have been much discussed or considered, and we think it cannot be supported. In that case, as well as this, we think the condition of liability to serve the office, from the subject-matter, and necessary implication arising from the use of the word "person," where it is found, must be considered as confined to such persons as are members of the corporation.

The only remaining question is, as to the demand for quarterage, claimed to be due, under the 15th bye-law; and we are of opinion, that the amount of the contributions claimed from the defendant in that respect does not properly constitute the subject of demand in this action. Whether the company's expenses require such contributions from its members, is a matter not properly before us; but considering this in the nature of a tax upon the company, we think it cannot be supported. We are aware that in the Innkolders' case (a), where the bye-law imposed 2s. a quarter, to be applied to a particular purpose, for the benefit of the company, the bye-law was held good, because the purposes for which the payments were applied, were commensurate with the payments, and might, on that account, remove all objection to the demand: whereas, here there is nothing to ground the claim in that respect, or to establish the existence of the necessity of raising such a contribution for the purpose of the company. The company may, for any thing that appears to the contrary, have funds derived from other sources sufficient for all corporate purposes. We are of opinion, therefore, that the verdict should stand for the plaintiffs for the sum of 21, 8s. 0d., under the fifth byelaw, and for 61.13s. 4d., under the tenth bye-law; and that so much of the verdict as respects the demand for quarterage, under the fifteenth bye-law, must be set aside, and a verdict entered for the defendant on those counts which sought to establish that claim.

<sup>(</sup>a) Cited in 1 Burr. 237, under the name of the Innholders' Company v. G. Ledhill, K. B., E. T., 30 Geo. 2.

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DENN, on the demise of GEORGE WILFORD BULKLEY. v. Anna Wilford.

EJECTMENT to recover the possession of a mansionhouse and land; and also a coach-house and stables, situate in the parish of St. Luke's, Chelsea, in the county of Middleser. At the trial before Abbott, C. J., at the Middleser sittings after last Michaelmas term, the case appeared to be this:—The lessor of the plaintiff claimed the property in question as heir at law of the late General Wilford, whose widow the defendant was. On the 20th December, 1822, General Wilford died, seised in fee of eighteen acres of sisting of land, nineteen messuages, one stable and one coach-house, situate in the parish of St. Luke's, Chelsea. His title to the property was acquired at different periods between the years 1790 and 1822. The mansion-house and land, which was the subject of this ejectment, he had inherited "of twelve from his father, Edward Wilford, Esq. who died in 1790. The coach-house and stables, which were also the subject twenty acres of this ejectment, were built by him on land which he had purchased of one Diron, in 1802. Five other of the messuages of which he died seised, were built on land purchased by him of one Jacob Eccardt, in 1811. One other of the messuages of which he died seised, was built land covered on land purchased by him of one Charles Eccards, in 1814. The remaining portion of the property of which he died seised was called the Ranelagh estate (formerly a place of public entertainment), consisting of about eighteen acres of land, and eight tenements erected thereon, which he had purchased at different times between 1790 and 1822. On this part of his estate he had erected three tenements or lodges, ground that and a house for his gardener, which, with the original eight

Where a testator, being seised in fee of several estates, in the parish of C., partly paternal, and the remainder purchased at different times, devised the whole [connineteen messuages and eighteen acres of land ] to his wife in fee, and afterwards levied a fine messuages, twelvegardens, of land, twenty acres of meadow, twenty acres of pasture, five acres of wood, and five acres of with water," and died suddenly without re-executing his will :---Held, in ejectment by the heir at law for the paternal estate (on the the fine operated as a revocation of the

will), that parol evidence was admissible to restrain the operation of the fine to one of the purchased estates on which were twelve messuages, so as not to pass the estate in question.

A fine of land, simpliciter, will pass houses thereon; but aliter, where a particular intent

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tenements, made twelve tenements, standing on what was called the Ranelagh property, at the time of his death, making the whole estate, therefore, to consist, as abovementioned, of about eighteen acres of land, nineteen messuages, one stable and one coach-house. The General had employed the lessor of the plaintiff, who was an attorney, in negociating the purchase of the Ranelagh estate, which had formerly been vested in certain shareholders. General had from time to time executed different wills, but on the 28th March, 1822, he made and published his last will and testament; by which he gave, devised, and bequeathed all and every his messuages, lands, tenements, hereditaments, and real estates, whatsoever and wheresoever, unto his dearly beloved wife Anna Wilford, her heirs, executors, administrators and assigns, for ever. General Wilford, having contracted with the governors of Chelsea Hospital for the sale to them of about six acres of land, part of the estate called the Ranelagh estate, an agreement was entered into for that purpose on the 12th August, 1820, between General Wilford, on behalf of himself and the other proprietors of Ranelagh, of the one part, and J. L. Bicknell, gent. on behalf of the Governors of the Hospital, of the other part. On that occasion, the lessor of the plaintiff acted as the General's attorney. There being some doubt as to the title to the Ranelagh estate, in consequence of the nature of the property, the attorney for Chelsea College required that a fine should be levied by the General, in order to perfect the title to the land which he had contracted to sell to the college. Accordingly, under the advice of the lessor of the plaintiff, the General assented to this proceeding, and a fine was accordingly levied by him and by Mrs. Wilford, on the 22d November, 1822, in the following terms.

"Michaelmas term, 3 Geo. 4, 1822. 6l. Middlesex. John Laurence Bicknell, plaintiff; Richard Rich Wilford, Esq., and Anna, his wife, deforciants. Of twelve messuages, twelve gardens, twenty acres of land, twenty acres of

meadow, twenty acres of pasture, five acres of wood, and five acres of land covered with water, with the appurtenances, in Chelsea, before," &c. General Wilford died suddenly on the 20th of the following month of December, without either re-executing his will, or making any codicil thereto. The question at the trial was, whether the fine above-mentioned operated as a revocation of the testator's will, and entitled the lessor of the plaintiff to recover as his heir at law. On the part of the defendants it was contended, that the operation of the fine must, at the utmost, be limited to the Ranelagh estate; and, with the concurrence of the learned Judge, parol evidence was received to shew that there were twelve messuages upon that estate, so as to satisfy the description contained in the fine; and therefore, that the fine did not necessarily include the whole of the testator's estates in St. Luke's, Chelsea, and operate as a revocation of his will, quoad the devise of his paternal property to his wife. learned Judge left it to the jury, as a question of fact, upon the evidence so received, whether the fine which had been levied by the testator was intended to be levied of the Ranelagh estate only, or whether it was intended to cover the whole of the testator's freehold estate of which he died seised. The jury found their verdict for the defendant.

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Copley, A. G., in Hilary term last, obtained a rule nisi for a new trial, on two grounds; first, that the operation of the fine was sufficient to cover the whole of the testator's property in Chelsea; and, second, that parol evidence was inadmissible to control, or limit, its operation to the Ranelagh estate.

Wightman (with whom were Brougham and Tindal) now shewed cause. First, as to the admissibility of parol evidence to control the operation of the fine, it is submitted, that such evidence was clearly admissible upon

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the question, whether the property which is the subject of this action was or not comprised in the fine. The fine here was levied of twelve messuages only, whereas it appeared in evidence that there were nineteen messuages upon the whole of the testator's property. If, indeed, the fine had been levied of nineteen messuages, there might have been some difficulty in shewing that twelve only were intended to pass; but the fine having been levied of twelve, it was perfectly competent to the defendant to shew that there were nineteen messuages, and, consequently, that the fine could not be intended to comprehend the whole of the testator's property. For this, Lord Brook v. Lord Laytymer (a), and Altham's case (b), are authorities. But, secondly, it will be contended on the other side, that although the fine in terms only professes to pass twelve messuages, yet, as it also contains twenty acres of land in Chelsea, it will comprise the mansionhouse in question, inasmuch as by law a messuage will pass under the term "land." There is, however, no foundation for that argument, even admitting the general proposition, that under the term "land," in a fine, houses would pass, for here, messuages as well as land are mentioned; et expressio unius est exclusio alterius. Had this fine been levied of land only, perhaps there might have been an argument raised for the purpose of shewing that by the word "land," houses would pass; but the fine being, in terms, levied of messuages as well as land, no extended construction should be given to it, so as to comprehend messuages not specifically mentioned. Moore v. Ewer (c), Knight's case (d).

Copley, A. G., and Scarlett, in support of the rule. It is not now disputed that parol evidence was admissible to shew what description of property the conuzor was seised of at the time he levied the fine; but it is contended that the effect of the fine in question, is to cover the whole of

<sup>(</sup>a) Keilw. 49.

<sup>(</sup>c) Cro. Eliz. 476.

<sup>(</sup>b) 8 Rep. 150.

<sup>(</sup>d) Godb. 357.

the testator's property in Chelsea, and so to revoke the devise to the wife, and entitle the lessor of the plaintiff as heir at law to recover. The question is, whether under the description of "land," all the houses upon the land will pass; and if that is the construction to be given to this fine, then the lessor of the plaintiff will be entitled to recover. It is to be observed as an important circumstance, that in this case the whole quantity of land of which the testator died seised, is less than the quantity of which the fine was levied; and therefore there will be no repugnancy or incongruity in holding that under the word "land," all This case is distinguishable from the houses would pass. Ewer v. Hayden, because there the word "land" was restrained to the limited sense in which the party obviously used it. Here there is nothing to shew any restrained import, and therefore according to the general rule of law, a fine of land will cover houses thereon; Co. Litt. 4 a.

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ABBOTT, C. J.—I am of opinion that in this case the There can be no doubt that it rule must be discharged. was competent to the Judge at Nisi Prius to receive parol evidence of the number of messuages, of which the conuzor was seised in Chelsea at the time of levying the fine. That seems not now to be disputed; and that evidence having been received, it was found that the conuzor, at the time of levying the fine, was seised of nineteen messuages. We are then to look to the fine itself, and see whether it passed those nineteen messuages. Now, the fine is of twelve messuages, twelve gardens, twenty acres of land, twenty acres of meadow, twenty acres of pasture, five acres of wood, and five acres of land covered with water. question then is, whether upon the true construction of this fine, it will pass more than the twelve messuages therein mentioned; and I am of opinion that it will not. The term "land" may, for the purpose of the present case, be allowed to be capable, sometimes, and according to some senses of it, of passing land with houses

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upon it. That may be conceded for the purposes of the present argument. Nobody will doubt that if the word "land" merely is used, without any qualification, it would be sufficient to pass meadow and pasture land, and land covered with water; but when we find that in this instrument twelve messuages are mentioned, and when we find also, not merely that twenty acres of land are mentioned, but also twenty acres of meadow, twenty acres of pasture, five acres of wood, and five acres of land, covered with water; it is impossible not to see that the term "land" was not intended to comprise meadow and pasture; and if it be clearly intended not to comprise meadow and pasture, a multo fortiori we must say that it was not intended to pass houses. That then being in my opinion the true construction of the instrument, and that the fine is capable of passing twelve messuages, and no more, the parol evidence was necessarily admitted to shew what were the twelve houses which were intended to pass. That was a question of fact to be decided by the jury upon the evidence; and I left it accordingly to them to say whether the fine was intended to pass any more than the twelve messuages which stood upon what is called the Ranelagh estate. They found for the defendant, and I think their finding was right, and ought not to be disturbed.

BAYLEY, J.—I also agree that the rule must be discharged. My opinion is founded, not upon the principle that parol evidence may be received for the purpose of shewing generally that the fine was intended to pass particular houses and tenements, when the terms of the fine would be sufficient to pass the whole estate, but upon the ground, that parol evidence was receivable to explain what was the nature and character of the property of which the conuzor was possessed at the time he levied the fine. I also think that the Judge at Nisi Prius had a right to inquire into the occasion upon which the fine was levied. Having gone so far, then, it would become a mere question of con-

struction upon the language of the fine itself. Now in this case we find that the fine is of twelve messuages, twelve gardens, twenty acres of land, twenty acres of meadow, twenty acres of pasture, five acres of wood, five acres of land covered with water, with the appurtenances in Chelsea. It appeared in evidence, that the testator had not a right to twenty acres of any description of land in Chelsea, but that the whole of the land of which he was seised consisted of about nineteen acres only. It appeared also in evidence, that he had not twelve messuages only, but that he had nineteen in Chelsea. If the fine had been levied of so many acres of land merely, it would have passed every thing which was standing upon the land; for according to Co. Litt. 4 a, "land, in the legal signification, comprehendeth any ground, soil, or earth, whatsoever; as meadows, pastures, woods, moors, waters, marshes, furzes, and heather. It legally includeth also all castles, houses, and other buildings;" but when it is ascertained that the word "land" may have a more limited signification, the fine itself must be looked to for the purpose of ascertaining what construction is to be put upon it. Here the fine is carefully worded, and we find that it specifies twelve messuages, and different descriptions of land, in certain quantities, giving to each description of land a definite meaning. Having then ascertained what was the nature of the property which the conuzor of the fine was possessed of at the time the fine was levied, it is merely a question of construction as to the operation of the fine; and therefore, looking at the language of this fine, I am of opinion that it cannot be construed to comprehend a greater number of messuages than twelve, and as the jury have found as a

HOLROYD, J., and LITTLEDALE, J., concurred.

fact, upon the evidence, that the fine was intended only to pass those messuages which stood upon the *Ranelagh* property, I think the verdict ought not to be disturbed.

Rule discharged.

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The owner of a carriage, hired a pair of day, and the jobman sent one of his own servants to drive the carriage and horses, and an injury having happened to a third person through the negligence of the driver :-Held, per Ab-bott, C. J., and Littledale, J., that the owner of the carriage was not liable for the injury: Aliter, per Bayley and Holroyd, Justices.

THIS was an action on the case for an injury to a horse of the plaintiff, occasioned by the negligence of the defenjob horses for a dant's servant. The first count of the declaration stated, that the plaintiff was possessed of a horse, and that the defendant was possessed of a carriage, and two horses harnessed to, and drawing the same; and which carriage and horses were under the care, government, and direction of a person, being the servant of the defendant in that behalf, who was driving the same, yet that the defendant by his said servant, so negligently and improperly drove and directed his said carriage and horses, that by the negligence and improper conduct of the defendant, by his said servant, the carriage ran and struck against the plaintiff's horse, &c. Second count same as the first, only omitting that defendant was possessed of the horses. Third count, that defendant was possessed of a carriage drawn by two horses, under care, government, and direction of defendant, yet that the defendant so negligently and improperly drove, governed, and directed the carriage and horses, that by the negligence and improper conduct of defendant, the carriage ran and struck against plaintiff's horse, &c. Plea, not guilty. At the trial before Abbott, C. J., at the London sittings after Michaelmas term, 1823, it appeared in evidence that the defendant, a country gentleman, came up to London for a few days with his own barouche, and sent to a stable keeper for a pair of job horses, and a coachman for a day. The stable-keeper accordingly sent the horses and one of his own men to drive them, the defendant having no previous knowledge of the person who was to drive them. The driver had no wages from his master, but was in the habit of receiving gratuities from the persons whose carriages he drove. The defendant paid him five shillings for his day's work; and during the day, he was under the control and direction of the defendant; and the accident in question happened on the day during which the driver was so employed. Upon this evidence the Lord Chief Justice was of opinion that the averment of the driver being the servant of the defendant, was not sustained, and therefore directed a nonsuit.

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Abraham, in Hilary Term, 1824, obtained a rule nisi for a new trial. Cause was shewn against that rule in Trinity Term in the same year, by Scarlett and Tindal; and Marryatt and Abraham were heard in support of it. The Court took time to consider of the case, and there being a difference of opinion on the Bench, the case was directed to be argued before the twelve Judges, and accordingly, on the 2nd February, 1825, the Judges, except the Lord Chief Baron, assembled at Serjeants'-Inn Hall, when the case was argued by Abraham for the plaintiff, and Tindal for the defendant.

The cases cited, and the arguments used on both sides, are fully noticed in the opinions delivered by the Judges, bereinafter set forth.

The Judges of this Court being equally divided in opinion upon the case, this day, severally delivered their judgments.

LITTLEDALE, J.—This was an action on the case to recover compensation in damages for an injury occasioned to a horse, the property of the plaintiff, which injury, as was alleged, arose through the negligent conduct of the defendant's servant, in driving a carriage and horses of the defendant. The cause was tried before the Lord Chief Justice of this Court, and the plaintiff was nonsuited. A rule nisi was afterwards obtained to set aside the nonsuit, and the Judges of this Court not being agreed in opinion, and the case being one of difficulty and of extensive consequences, it was argued at Serjeant's-Inn Hall, before eleven of the Judges, the Lord Chief Baron of the Exchequer being absent; and there being a difference of

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opinion amongst the other Judges, it now remains for the Judges of this Court to deliver their judgment upon the case.

The facts were these:—The plaintiff was owner of the horse that was injured; the defendant was owner of the carriage, and he having occasion to use it, applied to a jobman, who supplied him with a pair of job-horses, and also with a coachman for the day. The job-man did not give anything to the coachman for the day's work, but the defendant paid him five shillings. This sum, however, was not paid in pursuance of any contract or engagement either with the job-man or coachman, but was merely given as a gratuity to the coachman, who had no employment relative to any business of the defendant, except the driving of the carriage in question. In the course of driving the carriage, the coachman, by his negligent conduct, occasioned the injury for which the action was brought, and the question for the consideration of the Court is, whether the defendant be liable.

According to the rules of law, every man is answerable for injuries occasioned by his own personal negligence, and he is also answerable for acts done by the negligence of those whom the law denominates his servants, because such servants represent the master himself, and their acts stand upon the same footing as his own; and in the present case the question is, whether the coachman, by whose negligence the injury was occasioned, is to be considered a servant to the defendant? For the acts of a man's own domestic servants, there is no doubt the law makes him responsible, and if this accident had been occasioned by a coachman who constituted a part of the defendant's own family, there would be no doubt of the defendant's liability; and the reason is, that he is hired by the master, either personally or by those who are entrusted by the master with the hiring of servants; and he is therefore selected by the master to do the business required. rule applies not only to domestic servants who may have

the care of carriages, horses, and other things, in the employ of the family, but extends also to other servants whom the master or owner selects and appoints to do any work, or superintend any business, although such servants be not in the immediate employ, or under the superintendence of the master. For instance, if a man is the owner of a ship. he himself appoints the master, and he desires the master to appoint and select the crew. The crew thus become appointed by the owner, and are his servants for the management and government of the ship; and if any damage happens through their default, it is the same as if it happened through the immediate default of the owner himself. The same principle prevails if the owner of a farm has it in his own hands, and he does not personally interfere in the management, but appoints a bailiff or hinde, who hires other persons under him, all of them being paid out of the funds of the owner, and selected by himself, or by a person specially deputed by him; if any damage happen through their default, the owner is answerable, because their neglect or default is his, as they are appointed by or through him. So in the case of a mine, the owner employs a steward, or manager, to superintend the working the mine, and to hire under-workmen, and he pays them on behalf of the owner. These underworkmen then become the immediate servants of the owner, and the owner is answerable for their default in doing any acts on account of their employer. This, however, is not the case of a man employing his own immediate servants, either domestic servants or others engaged by him to conduct any business or employment, or occupation carried on by him. If this injury had happened by the acts of a coachman, appointed by the defendant himself, or by a servant or manager of the defendant, to whom he had entrusted the duty of appointing the coachman, the defendant would be liable. But that is not the case. The jobman was a person carrying on a distinct employment of his own, in which he furnished men, and let out

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horses to hire to all such persons as chose to employ him. This coachman was not hired by the defendant, nor had he the power to dismiss him. He paid him no wages. The man was only to drive the horses of the jobman. is true the master paid him no wages, and the whole which he got was from the person who hired the horses, but that was only a gratuity. That is the case with servants at large inns and hotels. Where there is a great deal of business, they frequently receive no wages from the owner of the inn or hotel, and trust entirely to what they receive from the persons who resort to the inn or hotel, and yet they do not become the servant of the customers, in respect of the services they perform for them. They still remain the servants of the inn-keeper, not upon wages it is true, but as servants upon expectation of gratuities, and therefore if the defendant is in this case to be answerable for the acts of the driver, provided by the jobman, it must be upon this principle—that if a man employs an agent to conduct any business, either for the benefit or the pleasure of the employer, such agent is to be looked upon in the same light as if he was the immediate servant of the employer, and that the owner of the property by employing such an agent to transact his business, confides to him the choice of the sub-agents, or under-workmen, and then the principle must go on to this,--that such agent and sub-agents, are to be considered in the same light as the foremen or manager of a person in conducting his business, and as the workmen selected by such foreman or manager; and that it makes no difference to the public, whether the injury be occasioned by the misconduct of a person employed by the principal, or by a collateral agent, and that the only thing to be looked to, is, whether the work is ultimately paid for by the principal in the course of whose employment the injury is occasioned. But I think, upon principle, as well as upon authorities, this rule cannot be carried so far. In Bush v. Steinman (a), Eyre, C. J., says,

<sup>(</sup>a) 1 Bos. & Pul. 404.

"the relation between master and servant, as commonly exemplified in actions brought against the master, is not sufficient; and the general proposition, that a person shall be answerable for any injury which arises in carrying into execution, that which he has employed another to do, seems to be too large and loose." Some instances may be put, to shew the justice of this distinction. If a man charters a ship for a voyage, or for time, and the master and mariners are employed by the owner, the ship is employed for the benefit, and for transacting the business of the charterer, just the same as if the ship was his own; and it might be said, that he who deputes to the owner the selection of the master and mariners, is liable for any injury which may be done by the master and mariners; but in such a case, the law has never considered the charterer liable to third persons for the negligence of the master and mariners. In Fletcher v. Braddick (a), the owners had chartered the vessel to the commissioners of the Navy, who were to put an officer on board, under whose direction the master was to act, and although there was a king's pilot on board, still the owners were held liable for running down the plaintiff's ship. If a person hires a boat, he is not answerable for the negligence of the crew. In Nicholson v. Mounsey (b), a captain of a man of war was held not liable for the default of the lieutenant, whose watch it was, when an injury was committed. If a man hires a carriage and horses, to travel from stage to stage, the carriage and horses are employed for the benefit or pleasure of the traveller, instead of using his own, which he may not do either from inability to keep horses, or a desire of expedition [which is done every day], and yet the law has never considered the traveller liable. distinction, in principle, between a man's hiring a carriage by the stage, and his hiring it by the day, for in one case as well as the other, he is using the carriage and the horses for his own benefit; he pays so much by the day instead

(a) 2 N. R. 182.

(b) 15 East, 384.

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of so much by the mile, and he pays the driver a gratuity in the one case as well as the other. There is no substantial difference between the one case and the other, and vet the traveller has never been held liable for an injury occasioned to a third person by the negligence of the driver. There are decisions expressly in point the other way. Sammell v. Wright (a), where the horses were hired to go to Windsor, the owner of the horses was held liable, because they were under the care and direction of his servants, although the carriage belonged to the traveller. In Dean v. Branthwaite (b), where a dispute arose between the owner of the carriage, and the owner of the horses, Lord Ellenborough said, a person who hires horses under such circumstances, has not the entire management and power over them, but they continue under the control and power of the stable-keeper's servants who were entrusted with the driving; and that he would be answerable for any accident occasioned by the post boys' misconduct on the road; and then he mentions a case which had occurred of that kind. In this case, the party travelling had his own carriage. A person who hires a hackney-coach cannot be considered as liable for the negligence of the Indeed, if the principle were carried to its fullest extent it would go to this, that the coachman might be considered as the agent or servant of both the owner of the carriage, and the owner of the horses; but that cannot be. In the cases referred to before Lord Ellenborough, the question was, whether the owner of the horses was or was not liable,—and I apprehend, that if one party be liable, the other cannot. The driver or postillion cannot be the servant of both traveller and horse-keeper. He is the servant of either one or the other, but not of both. I take it. that this is not a case in which the law would recognise two several principals. The action must either be brought against the principal or the person who commits the

<sup>(</sup>a) 5 Esp. 263.

injury, as in Stone v. Cartwright (a), where it was held in an action for negligently working a mine, that the action must be brought either against the principal, or the servants by whom the injury was occasioned, and that it could not be brought against the agent who hired the workmen. There are, however, cases in which it has been determined that a principal may be held liable for the negligent acts of persons who were not his immediate servants, but servants of persons whom he had employed as agents to do the work. In Bush v. Steinman (b), the owner of a house had employed a surveyor to do some work upon it; there were several sub-contracts, and one of the workmen of the person last employed, put some lime on the road, in consequence of which the carriage of the plaintiff was overturned, and it was held that the owner of the house was liable for the consequential damage, though the person who occasioned the injury was not his own immediate servant. In the case of Sly v. Edgley (c), a person who had employed a bricklayer to make a sewer, who left it open, in consequence of which the plaintiff fell in and broke his leg, the person who employed the bricklayer was held liable upon the principle of respondent superior, that he had employed the bricklayer, and was answerable for what he had done. The case of Leslie v. Pounds (d), has also some resemblance to those I have referred to. There the tenant of a house was bound to repair, but the landlord superintended the repairs, and on being remonstrated with by the commissioners of pavement, as to the dangerous state of the cellar, had promised to take care of it, and had put up some temporary boards as a protection to the public, but they proved insufficient, and an accident having happened, he was held liable; but this was on the ground that the defendant had personally interfered about his own property. The case of Bush v. Steinman, is, however, the first that

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<sup>(</sup>a) 6 T. R. 411.

<sup>(</sup>b) 1 B. & P. 404.

<sup>(</sup>c) 6 Esp. 6.

<sup>(</sup>d) 4 Taunt. 649.

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decided that the owner of the property was liable for the acts of servants or collateral agents. None of the cases there referred to come up to the point decided. Some of them were cases of injury not occasioned by the under-workmen, but by the persons employed by the owner of the property, which appears to me, to make just all the difference. Others of the cases cited, were of persons whose liability arose from matters of contract, and the questions were, who was to be the responsible person. The cases therefore relied upon there, had very little application to the question then under consideration. And it must be observed, that Lord Chief Justice Eyre was of opinion at Nisi Prius, that the action was not maintainable, and though he afterwards concurred in the opinion given by the Court, yet he says, both at the beginning and at the end of his judgment, that he finds great difficulty in stating, with accuracy, the grounds on which the judgment of the Court is to be sup-This case, therefore, of Bush v. Steinman, does not rest upon the same basis of reasoning and authority, and has not the same bearing on this case, as if no such doubt had been expressed, and therefore, it is to be considered in a great measure as depending on the peculiar circumstances there disclosed, and not upon the principle of liability attaching to a master, for the acts of his servant. In that case, Mr. Justice Heath says, in giving judgment; "Where a person hires a coach upon a job, and a jobcoachman is sent with it, the person who hires the coach is liable for any mischief done by the coachman, who is sent with it; the person who hires the coach is liable for any mischief done by the coachman while in his employ, though he is not his servant." This is the opinion certainly, of a very able judge, and is entitled to great weight and consideration, but it is an obitur opinion, and in a case like the present, where there is great contrariety of opinion among the Judges, the question must be determined, not by the opinion of any particular judge, but upon principle, and the authority of solemnly adjudged

But assuming these cases, to which I have referred, to have been rightly decided, there is this material distinction, that in those, the injury was done either upon or near, and in respect of, the fixed property of the defendants, of which they were in possession at the time. This was strictly so in the case of Bush v. Steinman, and the rule of law may be, that in all cases where a man is in possession of land or buildings, he must take care so to use them as not to injure other persons; and whether his property be managed by his own immediate servants, or by contractors, or their servants, it comes to the same thing. The injuries done upon land or buildings are in the nature of nuisances, for which the occupier ought to be chargeable, when occasioned by any acts of persons whom he brings upon the premises. The use of the premises is confined by the law to him, and he should take care not to bring persons there who do mischief to others. It may perhaps be said, that the defendant in the present case, being the owner of the carriage, the principle of these cases applies; but admitting the authority of these cases, the same principle does not apply to goods and personal chattels, because they are not always confined to the care of the owner in the same manner as buildings and lands. The various avocations of mankind often require the mere temporary use of a personal chattel, the enjoyment of which is in many cases trusted to the care and direction of persons exercising public employments; and the mere possession, where the care and direction of the thing is confined to those persons who make it their business and occupation to supply the necessary means of using it, is not sufficient to render the owner liable. Moveable chattels are sent into the world by the owner, to be conducted by other persons. The common intercourse of mankind does not make a man, or his own servants, always accompany his own property. He must in many cases confide the care of it to persons whose business and employment is to take care of, and supply the means of

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its enjoyment, and who are therefore answerable for the default of themselves and their servants. In the instances of various kinds of carriages, they are frequently, in the common intercourse of the world, confided to the care of persons who provide the drivers and horses, and it is not considered that the drivers necessarily belong to the owner of the carriage. And I think that there cannot be any difference in point of law as to the liabilities of these persons, arising from the mere ownership of the carriage, and that the ownership of the carriage makes him no more responsible than it would do, if it had been sent to be repaired by a coachmaker, who, in the course of repair, had ocasioned any damage to other persons, although in the one case, the carriage would be stationary, and in the other moving about from place to place; and although, in both, the work is done for the benefit of the owner. It seems to me, therefore, that the injury occasioned in this case by the driver of the horses, throws no liability upon the owner of the carriage, but that the driver himself, or the person who appoints him, is to be responsible. It may be said, that upon this principle, a person who hires job horses and a job coachman for a year, would hot be answerable for the negligence of the coachman.' Provided the coachman remains the mere servant of the job man. and is not otherwise employed in the service of the hirer. I think the hirer would not be liable, for whatever time he hired the coachman and horses; but in practice it very often happens, that where the coachman is hired for a year he is called upon to discharge other daties beside that of merely taking care of the coach and horses. If in such cases he became the servant of the hirer, and also of the jobman, a different question might arise. 'In' Chilcot v. Bromley (a), it was held, under a general bequest of a certain sum of money to each of the testator's servants. that a coachman supplied by a job man, together with a job carriage and horses, which were hired by the year, Och a Same '(a) 12 Ves. 114.

was not entitled to take under the bequest, inasmuch as he could not be considered as the testator's servant. are many cases where questions have arisen as to the liability of owners of ships having pilots on board, of captains of ships of war, of postmasters, of principals and factors, and other cases, as to what degree of possession is retained by the owner. These cases, however, I have not noticed, because I think the real question here is, whether, if a man employs an agent who carries on a public business, to do work for him, and the workmen employed by the agent are guilty of negligence, the person who employs the agent, is to be answerable for the consequences? and, upon the whole, I am of opinion that this defendant is not liable for the negligence and misconduct of the coachman appointed by the jobman to drive the carriage, and therefore, that the rule for setting aside the nonsuit must be discharged.

HOLROYD, J.—This was an action on the case, to recover a compensation in damages for an injury done to the plaintiff's horse, by the negligent driving of a barouche, or carriage, and horses. The declaration in the first count stated, that the defendant was possessed of a carriage, and two horses harnessed to, and drawing the same, and which carriage and horses were under the care, government, and direction of a person, being the servant of the defendant in that behalf, who was driving the same; yet that the defendant by his said servant, so negligently and improperly drove, and directed his said carriage and horses, that by the negligence and improper conduct of the defendant by his said servant in that behalf, the car-

riage ran and struck against the plaintiff's horse. The second count was similar to the first, except in stating

that the defendant was possessed of the horses. The third count stated, that the defendant was possessed of a carriage drawn by two horses, under the care, government, and direction of the defendant; yet that the defendant so LAUGHER U. POINTER.

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negligently and improperly drove, governed, and directed the carriage and horses, that by the negligence and imp proper conduct of the defendant, the carriage mn and, struck against the plaintiff's horse. In proof of this dem claration it appeared in evidence, that the defendant, at, the time when the accident happened, was riding in a, barouche, being his carriage, which was drawn by a pair, of horses, driven by a person pursuant to the defendant's The driver and horses being hired by the defendant for the day, to go wherever he the defendant pleased, for hire, to be paid by the defendant to Bryant, the owner of the horses, and for which driving the defendant afterwards voluntarily paid the driver a gratuity of 5s.; and the question on the trial was, whether the defendant under such circumstances was by law answerable in this action, for the negligence of the driver as his servant, in such driving. It was contended in the argument, not only that the defendant was not responsible for the driver, but that the plaintiff could not recover on this declaration, each count of which contained a material allegation, that the act was done by the defendant's servant, whereas the driver could not be considered as his servant: but my mind has come to the conclusion, that the defendant is: responsible for the driver's negligence; and responsible too, upon this declaration, the driver being to be consisdered in my opinion, for this purpose, as in law, his servant. It appears to me, that this defendant stands in the same situation of responsibility, as if the horses had been driven by Bryant himself, or as if they had been driven by a person chosen by the defendant himself, for the driving is equally under the authority and orders of the defendant, and equally for his profit, benefit, or pleasure; and the driver is, I think, equally the defendant's servant. for that purpose, whether the driver be Bryant himself... the person directly hired, or employed by the defendant, or by another person selected and appointed by the defendant himself, or the person selected and appointed by

Brijant under the authority or permission of the defendant. The question is not, whether Bryant, as the owner of the horses, and the immediate master of the driver, might or might not have been made responsible for the driver's negligence, nor is this the case of a letting for a particular purpose only, such as going to a particular place, as in Dean v. Branthwaite, and Sammell v. Wright, where the hirer was considered not to have the entire management and control over the things so hired; from which cases the present is distinguishable, because the present hiring was for no such particular purpose, but to go with the carriage where the defendant chose, and to be under his general authority and orders in that respect for a certain time: by such a letting for a certain time, the defendant became possessed in law of the horses so let to him, whilst he was using them under such letting. would be so clearly, if they had not been retained in the custody of a driver provided by Bryant, according to the doctrine of Lord Ellenborough in Lotan v. Cross (a) where he says, "shew a letting (of the chaise) for a certain time to Brown, and the possession would be in him;" and in Hall'v. Picard (b), where by the horses being let to hire to Dr. Carey for a certain term, he, and not the owner, was deemed to be the person in possession of them, as he, Dr. Carey, had a right to retain them till that time was expired, though indeed in that case Dr. Carey is stated to have been driving them by his own servants when the mischief was done. But in the present case, although the horses were continued in the custody of a driver provided by Bryant, yet as the horses and the driver were to be for the use, and subject to the general directions, of the defendant; and as the defendant had a right to retain them till the time for which they were hired was expired; and as they were at the time the mischief LAUGHER
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(b) 3 Campb. 167.

was done, in the use, and under the directions of the

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defendant, I think that the driver was for this purpose; in the employ, and in law, the servant of the defendant; and that the defendant was in law answerable for the driver's negligence in the execution of the defendant's orders in such employ, in whatever situation the driver might also stand, with respect to Bryant, with regard to Bryant's responsibility for him, at the election of the plaintiff. A person may stand in the relation of servant to two different persons as his masters in two different respects, with regard to the same thing, and this, even though the service done, or to be done, be special and limited to a single act, as appears in 2 Rol. Abr. 556, pl. 14, though that indeed was a case in which the party employing the officer, who was considered as his servant, would not be responsible for the conduct of the officer as his servant; but that would be so on account of the duties and obligations upon the officer, and upon grounds not applicable to the question of the defendant's responsibility in the present case. There it is said, " if a serjeant of London, or bailiff in a county, take a man upon a capias in process at my suit, and J. S. rescue him out of his possession, I may have a general writ of trespass against him, because the serjeant is as well my servent to this purpose, as the servant to the king;" (that isy as it is expressed in Hobart, 180; minister as well to the person suing out the process, as to the Court);" and therefore the taking out of the possession of the sevent, who is my servant, is a taking out of my possession." Trin. 15 Jac. Wheatley v. Stone, adjudged in a writ of erfor: at Berjeant's Inn. So in the present case, I think the horses were to be considered in law as in the possession of the defendant, and the driver as the defendant's servant, for the purposes for which he was sent to the defendant; and I think that a taking of the horses or driver away from the defendant's service during the time for which he had hired them, would have been a taking them away from him, for which he might have maintained an action of

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arespass, as for a taking them out of his possession and service; and, consequently, that he was answerable for the driver's negligence in driving him, the defendant, whilst ander his, the defendant's orders; and it is to be considered, I think, as the defendant's driving of the carriage and houses by his servant. That the responsibility is not confined to the immediate master of the person who committed the injury; and that the action may be brought against the person from whom the authority flows to do the act, in the negligent execution of which the injury has arisen, is established by the case of Bush v. Steinman (a); where the owner of a house having contracted with a surveyor to repair the house for a stipulated sum, and the surveyor having contracted with a carpenter to do it, who employed a bricklayer, who contracted for a quantity of dime with a lime-burner; the owner of the house was held responsible for the damages occasioned by the limeburner's servants improperly laying that lime in the high The principles on which that case was decided apply, I think, directly to the present case, and shew the responsibility of the present defendant; and, indeed, Heath, J., puts the very case, that where a person hires, a couch upon a job, and a job coachman is sent with it, the person who hires the coach is liable for any mischief done by the coachman, while in his employment; though (as the learned Judge is there reported to have said), he is not his actual servant. But under the circumstances of the present case, in the way in which I view the law upon the subject. I think the defendant is liable for the negligence of the driver, as his servant, driving the defendant, pursuant to his orders; the driver being in law his servant, in my pointon, for that purpose, according to the declaration: hand, gomequently, that the nonsuit ought to be set aside, and a new trial had.

San Section Contract

BEKLEY, J.—I agree in opinion, in this case, with

(a) 1 B. & P. 404.

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my brother Holroyd. The question is, whether the owner of the carriage is, under the circumstances of the case, answerable for the negligence of the driver. This is not the case of a driver, where, according to established wage; the carriage and horses, and the driver, belong not to the person driven, but to another master, who may be easily discovered, as in the case of a hackney-coach; nor is it the case of a driver, where, according to established usage, neither the horses or driver belong to, or are dominously in the service of the person driven, but belong to another master, who is either known, or may easily be discovered, as in the case of post horses; but it is the case of a person who hires a pair of horses for the day, to draw his own carriage, and leaves it to the owner of the horses to send such person to drive them as such owner may think fit. There is nothing from usage, or otherwise, to imply that the horses are not the defendant's, and the driver his regular servant; nothing to designate, or to make it easy to discover, to whom the horses and driver belong. The general rule in the case of master and servant, as laid down in Boson v. Sandford (a) is, that the man who employs another is answerable for the acts of the person employed, in the course of the employment. Had the defendant hired the driver, can there be any doubt but that he would have been the defendant's servant? If he leaves it to the owner of the horses to hire him, is he not, in substance, hired by the defendant? If I have horses of All and hire B. to drive, B. is undoubtedly, for the time, my servant. Is the driver less my servant for the time, because I hire him and the horses under one bargain, and allow the owner of the horses to select him? He is one ployed for me, that cannot be disputed. He is to drive where I direct; and, so as I require nothing contrary to my contract with the owner of the horses, he must obey my reasonable commands. He must go where I order: he must stop where I require; he must go the pate; I

specify, taking care that it is not an unreasonable pace. Though the owner of the horses is, to a certain extent, his master, I am, to a certain extent, his master also. the fermer is his master in general, he has, for a time, let him out to me; and the master is liable for the acts of she who is in his service or employ; though the master, who is to be charged, is not his immediate employer, but employs him through the medium of another. the driver, I am answerable for him. If I employ J. S. to hire him, am I not still answerable? I exercise my own indement in the one case; I leave it to J. S. to exercise a judgment for me in the other, but still it is for me the judgment is exercised; the service is performed for me; it is my work the driver does. In Bush v. Steinman, the man who did the wrong was not selected by the defendant, was not immediately employed by him, he was only employed through the medium of one who contracted to do the work for the defendant, but he was doing the defendant's work, He was, through the medium of the contractor, indeed, but still he was, working for the defendant; and, on that account, the defendant was held liable. If a deputy has power to make servents, the principal will be chargeable for their misfessance; for the act of the servant is the act of the deputy, and the act of the deputy is the act of the principal. This was laid down by Holt, C. J., in Lane v. Cotton (a). The owner of a ship is answerable for the misseasance of mariners, though he leaves it to the master to select the oraw. The owners of a coach will be liable, though they leave it to J. S. to select the driver and horses, although they employ as driver the man who owns the horses. many, instances, one proprietor horses a coach for one stage, another for a second, and so on; and in some instances, the man who finds the horses finds the coachman also. Shall this take away the liability of all the proprietors? Shall it be said, if the coach does an injury upon a given stage, that the proprietor who finds the (a) 1 Ld. Baym. 656.

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horses, and driver for that stage, shall alone be liabled The horses and driver are found by the one, to do the work of all; they are employed upon the work, and for the benefit of all; and therefore all are responsibles ... Nos does it seem to me to make any distinction, whether the driver and horses are hired for a single day only, or for a longer period. Had they been hired for a year, is, there any doubt but that the hirer would have been liable? What if they had been hired for a month, or for a week, would the difference of period for which they were bired make a difference in the responsibility? Can any legal principle be adduced, to make the period the criterion of being answerable or not? The driver is equally employed on account of the hirer, to do the work of the hirer; to.do the lawful commands of the hirer; and to be the temporary servant of the hirer, whether he is engaged for the day, the week, the month, or the year; and the hirer bears the appearance, for the time, of standing in the relation of master to the driver; and these are circumstances which, in my judgment, make the hirer responsible. Upon these grounds, therefore, that the driver, in this case, was in the temporary employ and service of the defendant; and that this is not a case in which, according to the known and established course of proceeding, it is notorious that the person driven does not stand in relation of master to the driver; and it is matter of easy discovery, who does stand in that relation, as in the cases of hackney-coaches and post horses; and that there was nothing in this case to rebut the prima facie presumption that the horses were the defendant's, and the driver his servant; I am of opinion that this defendant was liable to the action, and that the nonsuit was wrong.

ABBOTT, C. J.—I am of opinion that the relember obtained for setting aside the nonsuit ought to be discharged. The question is, whether either of the counts in the declaration was sustained by the evidence given at the trial-

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The evidence given was, that the defendant, a gentleman distally residing in the country, being in town for a few days, with his own carriage, sent in the usual way to a stable-keeper for a pair of horses, and a man to drive them, Being the horses and driver mentioned in the declaration The defendant did not select the driver, nor had any previous knowledge of him. The stable-keeper sent such a person as he chose for this purpose. I thought, at the trial, that the driver could not be considered as the servant of the defendant, so as to sustain either of the first two counts; and also that the horses were not under the care. government, and direction of the defendant; nor driven, governed, and directed by him, so as to sustain the last count. And, with all due respect for such of my learned brothers, both in and out of this Court, who think otherwise, I must say, that I still entertain the same opinion. I will first advert to the authorities quoted on the one side, and then on the other. The decisions cited for the plaintiff were "the fudgment" of the court of Common Pleas, in But v. Steinman (a), as furnishing a principle; and the observation of Mr. Justice Heath, referring to a supposed ease like the present, and assuming that the owner of the carriage would be answerable; Hall v. Picard (b), and Choft v. Allison (c). On the part of the defendant were oited, Chileott v. Bromley (d); Deane v. Branthwaite (e); Summelt's. Wright (f); and the case of Sir Henry Moughton, before Lord Ellenborough, at Wurwick. ference was also made to Pothier's Treatise on Oblightions. Part 1: No. 121. The case of Bush v. Steinman was an section against the owner of a house under repair, and not inhabited, for causing a quantity of lime to be placed on the high road, whereby the plaintiff's chaise was overturned, and damaged. The defendant, who had never occupied the house, had contracted with a surveyor to beginner o

<sup>(</sup>a) 1 B. & P. 404. (b) 3 Campb. 187.

<sup>(</sup>d) 12 Ves. 114.

<sup>(</sup>e) 5 Esp. 35.

<sup>(</sup>c) 4 B. & A. 590.

<sup>(</sup>f) Id. 263.

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do the whole; the carpenter employed a brickleyer; the bricklayer contracted with a lime-burner quantity of lime, and the servant of the latter :last At the trial before Lord Chief the lime in the road. Justice Eyre, the plaintiff was nonsuited, but his lerdship afterwards changed his opinion, and concurred with the other Judges of the Court, in granting a new trial, though! he confessed he found a difficulty in stating with accuracy the grounds on which the action could be supported. He appears, however, to have been influenced chiefly by the two cases of Stone v. Cartwright (a), and Littledale v. Lord Lonsdale (b). These were actions for injury done to a dwelling house by the improvident working of a colliery under it. In the first case, the owner of the colliery was an infant; the action was brought against an agent and manager appointed by the court of Chancery, who hired and dismissed the workmen at his pleasure, but took no personal concern, was not present; and had given no particular directions for working the mine in the manner that occasioned the mischief. The defendant in this case, was held not to be answerable; and Lord Kenyon said, "I have always understood that the action must be brought against the hand committing the injury; or against the owner for whom the act was done. " ! The: latter was an action against such owner, and was held maintainable. These cases establish the principle, that the owner of a mine is answerable to the person whose property may be injured by the improvident manner of working it. And if to these we add, the case of Bush we Steinman the principle will be carried no further, it will! only be applied to the owner of a house, and render kim' answerable for an improvident act taking place in the repair of it. The case of Hall v. Picard; was a question as to the proper form of action, whether trespass or case. It was an action for an injury to a horse belonging to the plaintiff, but let by him for a term to a gentleman whose

(a) 6 T. R. 411.

(6) 2 H. Bl. 209.

carvingle it was drawing, and by whose servant it was driven; and it was held, that case, and not trespars, was the proper form of action; for the plaintiff had neither the legal) nor actual possession of the horse so as to maintain trespassi . The case of Crost v. Allison, was an action for ant injury to a carriage. The plaintiff, a stable-keeper. had bired the carriage of a coachmaker for a day, had furnished horses, appointed a coachman, and then let it out to a third person for the day. Under these circumstances, it was held that the plaintiff was the proprietor of the carriage pro tempore. On the other hand, the case of Deane v. Branthwaite, was decided upon the principle that the owner of homes let to draw the defendant's carriage to Epsom races, under the conduct of postillions appointed by the plaintiff, had not thereby put the horses into the passession of the defendant so as to preclude himself from maintaining an action of trespass against the defendant for an injury done by him to one of them. The case of Semmell v. Wright, was an action brought against a stablekeeper who had let four horses in the usual way to draw a lady's carriage to Windsor, and the defendant was heldliable to the action. The case of Sir Henry Houghton, was that of horses hired by him to draw his carriage travelling post and he was held not to be answerable. It is true that all these three cases were decisions at Nich Principles they were the decisions of a very great Judge, and were not afterwards brought before the Court. The case of Chileott, v. Bromley, was a suit for a legacy under a will whereby a legacy was given to each of the testator's servants. The testator hired a carriage and horses for a year of a job-master, who also supplied a coachman and paid him nine shillings per week. testator paid him twelve shillings a week for board wages, and he received a livery with the other men servants. The question was, whether this coachman was a servant of the testator within the meaning of the will. Master of the Rolls held, that he was not, and appears to

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have founded his judgment principally upon the ground that there was no contract between the testator and che coachman, the contract being with the job-master, who might change the coachman if he should think fit; with out a breach of his contract, if he substituted amother of whom the testator could not have reason to complain. Upon this review of the decisions, they was pear to and to predominate in favour of the defendant. The three cases of Stone v. Cartwright, Littledale v. Lord Lonschele, and Bush v. Steinman, do not, in any opinion, futnish a sule by which the present case ought to be governed. Whatever is done for the working of my mine; or the repair of my house, by persons immediately employed by me, may be considered as done by me. I have the control and management of all that belongs to my house, and it is my fault if I do not so exercise my authority as to prevent izjary to another. But does it follow from this, that I have the care, government, or direction of horses hired by mbof another person, who sends a servent of his own choice to conduct and manage them, because I have hired horses to draw my carriage? and bearing or the con-

The epinion given by Mr. Justice Heath on this subject, in the case of Bush v. Steinman, was entra judicial multiple has the weight properly belonging to the opinion of alverty learned judge, but it could not be revised, and has not the authority of a judgment. The case of Dean v. Branthwaite, and Summell v. Wright, and the case of Sir Henry Houghton, were decisions at Nisi Prius, but they were the decisions of a very learned judge. They were capable of revision, they were not afterwards questioned, and the last of the three bears directly upon the question in the present case.

Having made these remarks upon the former cases, I will now proceed to make some observations upon the case as it might stand, independent of prior decisions. I admit the principle, that a man is answerable for the conduct of his servants in matters done by them in the

bremise of the authority that he has given them; and salso, which is the same thing in other words, that whatexer is done by his authority, is to be considered as done bischima I am sensible of the difficulty of drawing any precise on definite line as to time or distance. But I must own, that I cannot perceive any substantial difference between hiring a pair of horses to draw my carriage shout London for a day, and hiring them to draw it for a stage on the road I am travelling, the driver being in both sades furnished by the owner of the horses in the usual way: sor can I see any substantial difference between hising the horses to draw my own carriage on these odcasions, and hiring a carriage with them of their owner. H the kirer be answerable in the present case. I would ask en what principle can it be said, that he shall not be answerable of he hires for an hour or for a day? "He has the use and benefit pro tempore, not less in the one case than in the other. If the hirer is to be answerable when he hires the horses only, why should he not be unawershie if he hires the carriage with them? He has the equal ture and benefit of the horses in both cases, and has most the conduct on management of, them more in the one case than in the other. If the temporary use and benefit of the horses will make the hirer answerable, and there be no reasonable distinction between biring them with or without a darnage, must not the person who hires a hackneycoach to take him ! for a mile or other greater or less disstance, on for an hours or longer time, be answerable for the deduct of the coachman? Must not the person who hires miwherry ion the Thames be answerable for the conduct of the materman 3 I believe the common sense of all mankind would be shocked, if any one should affirm the hirer to, be answerable in either of these cases. Will it be said. that the hirer is not answerable in either of these cases, because the coachman and the wherry-man are ready to aftendito, the call of any person who; will remploy them? Lienswary tso valso is the stable-keeper. .. If it be said that

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they are obliged to obey the call of any person when sheg: are on the stand or at the stairs, I would ask, with therei be any difference if they are spoken to beforehand, and desired to attend at a particular hour, which is not an unusual occurrence where persons have an engagement to go out at an early hour in the morning? If the personal: presence of the hirer will render him responsible, why should he not be equally so if he is absent, and has hired. the horses or carriage for his family or servants? Does his presence give him any means of superintending or controlling the driver? Can any legal obligation depend upon such minute distinctions? If the case of a wherry on the Thames does not furnish an analogy to this subject, let'me put the case of a ship, hired and chartered for a voyage on the ocean, to carry such goods as the charterer may think fit to load and such only. Many accidents have arisen from the negligent management of such vessels, and many actions have been brought against their owners, but I amnot aware that any has ever been brought against the charterer, though he is to some purposes the dominus protempore, and the veyage is made not less under his emaployment and for his benefit, whether he be on board or not, than the journey is made under the employment and for the benefit of the hirer of the horses! Why then here! the charterer of a ship, or the hirer of a wherry, or of w hackney-coach, never been thought answerable? I answer, because the ship-master, the wherry-man, and the hackut ney-coachman have never been deemed the servants of the hirer, although the hirer does contract with the wherever man and the coachman, and is bound to pay them; and the pay is not for the use of the boat, or horses, or car-10 riage only, but also for the personal service of the mani-In the case now before the Court, the hirer makes no contitract with the coachman, he does not select him, and has no privity with him; he usually gives him a gratuity, but he is not by law bound to give him a shilling, and from thence I conclude that the coachman is not the servant of

the hiver: and if the coachman is not the servant of the hirer on such an occasion, but is chosen and entrusted by the owner of the horses to conduct and manage them, I think it cannot be said that the hirer has in point of law what he certainly has not in fact, the conduct and management of the horses. If the coachman is in such a case the servant of the hirer, he may at any moment require him to quit the charge of the horses and deliver them over to another, and must be obeyed; but I think it cannot be said that the coachman may not lawfully refuse, and ought not in most cases to do so. It does not seem to be doubted, that the injured party may not sue the owner of the horses; is there then any rule of law, or any principle of convenience, requiring that he should have his choice of suing either the stable-keeper or the hirer at his election. Generally speaking, the one is as able to pay damages as the other, and may be as easily found out and known, and more easily if the carriage and horses are hired together. Should the hirer be held responsible in the first instance, he must certainly have his remedy over against the latter, so that the latter will in the end be answerable; and there will be a circuity of action which is inconvenient, and to be avoided if possible. already acknowledged the difficulty of drawing a line with reference to time and distance, and I think we must look to other circumstances in order to ascertain the obligation of the hirer. Length of time may, in itself, be a circumstance deserving of attention; because it may be evidence of the subsequent approbation and continuance, if not of the original choice, of the coachman; the payment of board-wages, and the furnishing of livery, may also be circumstances worthy of attention, because they also may

in some cases be considered as evidence of a choice and a contract. I do not pronounce upon any case of that kind. I speak only of the present case, and of the evidence given at the trial; and not being able to find any reason satisfactory to may own mind, by which the

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eldest son of

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real estate in B. to the said

son for life, remainder to

his first and

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settlement, and

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defendant in this cause can be made answerable in the present action, I think myself bound to say, that in way opinion the rule for setting aside the nonsuit should be discharged.

Rule discharged.

LE HUNTE v. HOBSON and others.

THE Master of the Rolls sent the following case for the Devise of lands in these opinion of this Court, words: "On the attainment James Le Hunt, formerly of Artrament, in Ireland, at of the age of

the time of making his will hereinafter mentioned, and 21 years of the from thence until the time of his death, being seised in fee simple of divers messuages, farms and lands, situate in the county of Pembroke, and being of sound and disposing mind, memory and understanding, duly made, and published his last will and testament in writing, bearing date the 20th day of December, 1779, which was duly executed and attested, as by law is required for passing real estates. and thereby gave and devised as follows, that is to say:-"I give and devise my real estate in Pembrokeshire to Daniel Stamford, Esq., and the Rev. Dr., Harvey, and their heirs, until some son of Major George Le Hunte shall attain his age of 21 years, on special trust, neverther less, that they and their heirs, or the heir of, the survivor of them, shall, during that period, out of the issues and profits thereof, pay a debt charged to be due by my late uncle Richard Le Hunte, to one Hornstower, a mercer of Kidderminster, or his representatives, of 751., with interest; and in the same manner any other debts of my said uncle Richard, that may appear to be really due and unsatisfied; but during the time they are levying the same,

the age of 21, and died, leaving a son who is still living:—Held, that the son of A's, second son was entitled to an estate tail in the lands in question, by virtue of the will.

idesire that they should allow 50%, per annum for the thatther of the eldest son of the said Major George Le Milde for the time being, from the time such same shall be levied, till such son of Major George Le Hunte shall arrive at the age of 19 years, and 1501. per annum after, and such allowance to be English money, and the residue to be erected into a sum towards discharging the 500l. due to the representatives of my late aunt Warburton. on the attainment of the age of 21 years of the said eldest son of Major George Le Hunte, I give the same real estate to the said son for life, remainder to his first and every other son in strict settlement, and so on to every son of the said Major George Le Hunte, remainder to the right heirs of my late uncle." The testator died soon after the date of his will, without having altered or revoked the same, leaving Richard Le Hunte, the eldest son of Major George Le Hunte, and William Augustus Le Hinte, the second son of Major George Le Mante; and two other some of Major George Le Hunte, 'ffine the said testator surviving. " The said last mained Richard Le Hante, the son of Major George Le Hunte, stiathed his age of 21 years in the year 1790, and thereupon enterett into the possession or receipt of the rents and profits of the said Pembrokeshire estate, and he continued in such bossession of receipt during the remainder of his life; and hillion; he suffered a recovery of the said estate, and by the deed making the tenant to the practice for that reco-Fertilitiwas declared, that the same should entire to the the of himself in fee. Richard Le Hunte, the son of Menor George Le Hante, died on the 21st day of March, 181B. leaving Richard Le Hante, his only son, und the defendants, Maria Hobson, Sophia Le Hunte, and Louise Le Minte, all infants; his only daughters, and no other insue him surviving. The last-named Richard Le Hunte died in September; 1921; an infant, without ever having been married, leaving the defendants, Maria Hobson, Sophia Le Hunte, and Louisa Le Hunte, his only sisters

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1826. Le Hunte v. Hobson. and co-heiresses at law, him surviving. The said William Augustus Le Hunte, the second son of Major George Le Hunte, attained his age of 21 years about the year 1791, and he died on the 9th day of February, 1820, leaving the plaintiff, his eldest son and heir at law, him surviving.

Rolfe, for the plaintiff. The plaintiff is entitled to an estate tail in the premises in question, under the will of the The devise is to the eldest son testator. James Le Hunte. of Major George Le Hunte for life, remainder to his first and other sons in strict settlement. Under that devise, Richard, the eldest son, took an estate for life only; therefore, the recovery suffered by him was inoperative. It will be contended on the other side, that he took an estate tail by virtue of the remainder to his first and other sons, and that, otherwise, the general interest of the testator cannot be effected; but the remainder has no such effect, and the words of it must be construed as words of purchase and not of limitation, unless the latter construction is absolutely necessary for effectuating the general interest of the testator. Allanson v. Clitheroso (a). Now, that construction is not necessary here, for the words "in strict settlement" in this devise have no ambiguity; their meaning clearly is, that the father shall take an estate for life, and the first and other sons an estate tail successive: and if those words are ambiguous, they must be rejected, and then the sons would take an estate for life. But then it will be said, even if Richard Le Hunte and his sons took estates for life, yet the limitation over to the second and other sons of Major George Le Hunte contains no words of limitation to their issue. argument has no weight; for first, it is impossible to suppose that the testator had an intention to limit the estate in one mode to the children of the first son, and in another to the children of the other sons: and second, the law-

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guage of the will may fairly be construed the same in both instances, for it is, "and so on, to every son of the said Major George Le Hunte," which must be taken to apply as well to the devise to the grand-children, as to the devise to the younger sons. The former devise is to the eldest son of Major George Le Hunte for the time being, upon his attaining the age of 21 years. Therefore, if Richard, the eldest born, had died under the age of 21 years, the second son would have been the first to take under that devise, as the eldest son for the time being; and in that case, there would have been an express limitation to his children. Then it follows, that the will ought to be so construed as to pass the estate to the children of the second son, even though the eldest son attained the age of 21 years; because it is impossible to suppose that such a circumstance was intended by the testator to operate to the disadvantage of those

Tindal, contra. Richard, the eldest son of Major George Le Huste, took an estate tail, and the recovery suffered by him was good; consequently, the estate has now vested in the defendants, his daughters, in fee. When the words of the devise are properly considered, they clearly establish that position. They are these:—
"And on the attainment of the age of 21 years of the said eldest son of Major George Le Huste, I give the same real estate to the said son for life, remainder to his first and every other son in strict settlement, and so on to every son of the said Major George Le Huste, remainder to the right heirs of my late uncle." Now, according to the

Sonday's case (a); Wilde's case (b); Wharton v. Gres-(a) 9 Rep. 127. (b) 6 Rep. 17.

established rule of law, a will is to be so construed as to give effect to the general intent of the testator, and it is quite clear that the word son may be read issue, if such a construction is necessary for that purpose.

1826. LE HUNTE v. Hobson. ham (a); Charlton v. Craven (b); Robinson v. Robinson (c). The question, therefore, is, whether the testator in this case had not a general intent which it is impossible to effectuate without giving to his will the construction now contended for. It is perfectly clear that Major George Le Hunte and his family were the objects of the testator's bounty, and that he did not intend the estate to go over, until that family was entirely extinct; for the devise includes not only the children who were born before the will was made, but those which might be born afterwards. Now, an estate cannot be limited to a son, unborn, for life, and afterwards to his son; that is an established principle of law: therefore, as the general intention of this testator cannot be carried into effect without holding that every son of Major George Le Hunte was capable of taking the estate, and as it must be supposed that the testator intended all the sons to take in the same mode, it follows that all the sons, if they take at all, must take an estate tail; because otherwise, the children of such of the sons of Major George Le Hunte as were born after the will was made, would be entirely excluded. It is contended on the part of the plaintiff, that the words "and so on to every son of the said Major George Le Hunte," limit the estate to the second son and his sons, in the same manner as to the eldest son and his sons; but if that is so, those words will limit the estate to every son of Major George Le Hunte, whether born before or after the will was made, and will, consequently, give a life estate to the sons of Major George Le Hunte born after the will was made. which, according to the principle of law already adverted to, cannot be done.

Rolfe, in reply. It may safely be conceded, that the word son in a devise may be construed to mean issue, when such a construction is necessary to effectuate the intention

<sup>(</sup>a) 2 W. Bl. 1083. v Mellish, ante, vol. iii. 808. 2 B.

<sup>(</sup>b) Cited, arguendo, in Mellish & C. 524.

<sup>(</sup>c) 1 Burr. 38.

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of the testator; the short answer to the argument is, that there is no such necessity here. The clear intention of the testator here was, that every son of Major George Le Hunte who became capable of taking under the will, should take an estate for life, and that their sons should take in strict settlement. With respect to the sons born before the will was made, that intention may be effectuated without any difficulty; and with respect to the sons born after the will was made, as the rules of law will not tolerate such a devise, either the devise to them must be held void altogether, or they must be held to take an estate tail.

The case was argued in Easter term last. lowing certificate has since been sent.

"We have heard this case argued by counsel, and have considered it, and are of opinion that the complainant is entitled to an estate tail in the land in Pembrokeshire, by virtue of the said will.

С. Аввотт.

J. BAYLEY.

G. S. HOLROYD." (a).

(a) Littledale, J., was not present at the argument.

FREE, D.D. v. M. BURGOYNE, Esquire.

I'N this case, in which the plaintiff declared in prohibition, to restrain the ecclesiastical Court from proceeding against him for incontinence, in order to procure his suspension or deprivation, the Court in Easter term last (b), awarded a consultation as to part of the proceedings. Upon the judgment of this Court, the plaintiff sued out a this Court, writ of error into the Exchequer Chamber, and obtained

Tuesday, 13th June.

The statute 27 Eliz. c. 8, which allows a writ of error into the Exchequer Chamber upon judgments in does not extend to suits in prohibition.

(b) Ante, 179.

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an allowance thereof, which was served upon the defendant's attorney on the 9th of May, the judgment of this Court having been giving on the 5th of the same month. The writ of consultation was issued and presented to the Arches Court on the 10th June. On a former day in this term, the plaintiff obtained a rule calling on the defendant to shew cause why the writ of consultation should not be quashed, on the ground that it had issued after the allowance of the writ of error; and why, in the meantime, all proceedings should not be stayed.

Campbell now shewed cause, and contended, that this was not a case in which a writ of error lay to the Exchequer Chamber, for the statute 27 Eliz. c. 8, s. 2, allowed of a writ of error from this Court into the Exchequer Chamber only in actions of debt, detinue, covenant, account, action upon the case, ejectment, or trespass, and did not extend to suits in prohibition.

Denman, contrà, contended that by the reasonable interpretation of that statute, suits in prohibition ought to be included within its beneficial operation; but

The COURT was clearly of opinion, that as a suit in prohibition was not enumerated in the statute 27 Eliz. c. 8, it could not be construed to extend to this case, and therefore that the rule must be discharged.

Rule discharged.

## DICKENS v. WOOLCOT.

UPON the taxation of an attorney's bill, in this case, the Master disallowed more than one-sixth of the amount, duced on taxand certified that the client was entitled to the costs of the taxation. On a former day, Abraham obtained a rule the amount nisi to have the Master's taxation reviewed, on affidavits tending to shew the reasonableness of the charges which pay the costs had been disallowed.

Archbold now shewed cause, and relied upon the express tion in the language of the statute, 2 Geo. 2, c. 23, s. 23, as an answer to the present application, and as shewing that the client was entitled, as a matter of course, to the costs awarded by the Master. By the statute the Court is authorised to award the costs of the taxation to be paid by the parties, according to the event of the taxation of the bill, that is to say, "if the bill taxed be less by a sixth part than the bill delivered, then the attorney or solicitor is to pay the costs of the taxation; but if it shall not be less, the Court, in their discretion, shall charge the attorney or client in regard to the reasonableness or unreasonableness of such bill." From the language of the statute, it was clear that the Court had not any discretion in the matter, inasmuch as in this instance, the bill was taxed at more than onesixth of the amount.

Abraham, contrà, insisted that the Court might exercise a discretion in the matter, and he relied upon White v. Milner (a), where it was held that an attorney is not liable to pay the costs of taxing his bill where the deduction of one-sixth is occasioned, not by the particular items being taxed, but by a whole branch of it being disallowed.

ABBOTT, C. J.—We are of opinion, that the whole (a) 2 H. Bl. 357.

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If an attorney's bill is reation by a sixth part of of the bill delivered, he must of the taxation to his client; the Court having no discrematter.

DICKENS v. Woolcor. matter having been left to the determination of the Master, and he having reduced the bill on taxation to more than one-sixth, we have no discretion, but must comply with the express language of the statute, which provides that, in such case, the attorney is to pay the costs of the taxation.

Rule discharged.

Wednesday, June 14th.

At Nisi Prius, the Judge refused totry an indictment of purjury, on the ground of the gross imperfection of the record; and the defendant beingagain indicted for the same cause, was found guilty, but obtained a new trial in K. B. Instead of taking down the old record again, the prosecutor preferred a third indictment, and removed it into this Court :-Held, that the defendant was not entitled to have the proceedings stayed, until the costs of the former proceedings were paid by the prosecutor.

## The King v. Tremaine (a).

 ${f A}{f T}$  the  ${\it Cornish}$  summer assizes, 1823, the defendant was indicted for alleged perjury, and the grand jury having found a true bill, it was removed by certiorari into this Court. The record was taken down for trial at the summer assizes, 1824, when the learned Judge who presided, refused to try it, the indictment being manifestly defective in form, but the learned Judge did not order it to be quash ed. A second indictment was then preferred for the same identical perjury, and being found a true bill, was removed into this Court, and taken down for trial at the summer assizes, 1825. At those assizes, the defendant was found guilty; but in Hilary term last, this Court awarded a new trial on the ground of a mis-trial (b). The prosecutor did not think proper to take down that record again, but, at the last spring assizes, chose to prefer a third indictment for the same alleged perjury. On a former day, in this term, R. Buyly obtained a rule calling on the prosecutor to shew cause why the proceedings on the last-mentioned indictment should not be stayed, until the costs of the two preceding indictments were paid; the affidavit, in support of the motion, detailing the facts above-mentioned.

Langslow now shewed cause, and contended that the Court had no jurisdiction to grant the costs of the former

- (a) Vide, ante, vol. v. 413.
- (b) See the case reported, ante, vol. vii. 684.

indictments. This was an application of the first impression; and when a similar motion was made, on a former occasion, in the same case, the Court refused to interfere. The defendant could not complain of any hardship, inasmuch as he had been convicted upon the only indictment which had been brought to trial, and it was at his own instance that a new trial had been granted. The prosecutor was at liberty to abandon the second indictment, and prefer another for the same cause; and, therefore, the defendant was not in a situation to entitle himself to costs.

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R. Bayly, contrà. It is quite clear that, by removing the proceedings into this Court by certiorari, this Court has jurisdiction over the costs; and, certainly, this is a case of so much hardship and oppression, that the Court will exercise its authority in compelling the prosecutor to pay the costs of the former proceedings before he is allowed to go on with the fresh indictment. There are three several indictments preferred for the same supposed perjury, which is, of itself, a sufficient ground for coming to the Court for costs. The third indictment, though for the same alleged perjury, has undergone some formal alterations. The prosecutor, therefore, as a matter of course, ought, on that ground alone, to pay costs upon the same principle that a party is only allowed to amend his pleadings on payment of costs.

ABBOTT, C. J.—If it had appeared that the prosecutor had acted oppressively towards the defendant in preferring the third indictment, we should, probably, have interfered; but the defendant having applied for a new trial after a conviction, he has subjected the prosecutor to additional expense. With respect to the defendant's own expenses, it can make no difference to him whether he is tried again upon the old or upon the new indictment.

The other Judges concurred.

Rule refused.

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Acknowledgment by the tenant in possession that he had received a declaration in ejectment on a Sunday, before the essoign-day of the term, the declaration having been, in fact, served on the premises on the preceding Saturday, is not sufficient to entitle the lessor of the plaintiff to judgment against the casual ejector.

## Doe v. Roe.

WHITEHEAD moved for judgment in this case, against the casual ejector, upon an affidavit stating that the service of the declaration in ejecment was by leaving it at the house of the tenant in possession, on the 20th of May, and that the tenant, the day after the essoign-day of this term, acknowledged that he had received the declaration on Sunday the 21st of May, the day preceding the essoign-day.

ABBOTT, C. J.—This will not do. It is clear that the service of the declaration in ejectment upon the tenant in possession on a Sunday, could not be deemed good service; and as there is here no proof that the declaration came to the hands of the tenant before Sunday, the 21st of May, the lessor of the plaintiff cannot be entitled to judgment. The acknowledgment of the defendant, that he received the declaration on the Sunday, is not sufficient.

The other Judges concurred.

Rule refused.

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Judgment, as in case of a nonsuit, may be obtained in Banc, by one of several joint defendants, if the plaintiff neglects to proceed to to notice.

## JONES v. GIBSON and another.

CHITTY, on a former day, moved, on the part of the defendant Smith, for a rule nisi for judgment, as in case of a nonsuit. On a subsequent day, cause was shewn against the rule by Archbold, on an affidavit which stated, that the defendants had severally pleaded the general issue by separate attornies, and issue was joined in Michaelmas term last, and notice of trial given for the sittings after trial pursuant Hilary term. He therefore contended, that this being

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an application by one of two joint defendants, without the apparent concurrence of the other, it could not be granted.

The case was referred to the Master, to report upon the practice; and now on this day he made the following report upon the rule :--

By statute 14 Geo. 2, c. 17, which authorises the application to the Court for judgment as in case of a nonsuit, it is previded, that all judgments given by virtue of that act, shall be of the like force and effect as judgments upon nonsuit, and of no other force or effect. In the absence of any authority upon this point, I apprehend, if this case had gone down to trial, and either of the defendants had appeared by his counsel, the plaintiff might have been called and nonsuited. I am therefore of opinion, that the defendant Smith is entitled to have the rule made absolute for judgment as in case of a nonsuit, and which will authorise a general judgment of nonsuit to be entered against the plaintiff.

With this epinion the Court agreed, and the rule was made absolute.

JOHN DOE on the demise of SAMUEL OVERING AUCH-MUTY. RICHARD TYLDEN AUCHMUTY, and HENRY JOHN AUCHMUTY v. JULIANA MULCASTER, widow, and RICHARD TYLDEN, and JANE his wife.

THIS was an ejectment on the joint and several demises of the above-named lessors of the plaintiff, for the recovery of certain messuages, buildings, lands, and premises, in continued the parish of Ospringe, in the county of Kent. The defendants pleaded the general issue, not guilty, and the issues were tried at the last summer assizes for the county after the

Wednesday, June 14th.

The children of an American loyalist, who his allegiance to the crown of Great Britain colonies were

separated from the mother country, and settled in America, are entitled to take lands by descent in England, within the operation of the statute 4 G. 2, c. 21, as natural born subjects of the crown of Great Britain.

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of Kent, before Best, C. J., when a verdict was found for the plaintiff, subject to the opinion of this Court on the following case.

The premises in question are of gavelkind tenure. The late Sir Samuel Auchmuty, deceased, in August, 1822, died seized thereof, unmarried and without issue, and intestate as to that property. He was the youngest som of Samuel Auchmuty, D.D., who was the son of a British born father and mother, and was born in Massachusetts, in North America, then a colony of Great Britain; was reetor of Trinity church, in the city of New York, in the state of New York, in North America, at that time also a colony of Great Britain; and died there prior to the recognition of the independence of the United States of Amenica by Great Britain, and at the time of his death was a British subject. The said Samuel, the father, left issue him surviving by his wife (an English born subject), three sons, namely, Robert Nicholls, who was the eldest, Richard. and the said Sir Samuel (who so died seized of the promises in question); and three daughters, namely, the abovenamed defendant Juliana, now the widow of Frederick Mulcaster, the above-named defendant Jane, now the wife of the said Richard Tylden, and Isabella.—All which issue were born in the province of New York, before the declaration by the American states of their independence, and before the recognition thereof. The said Richard and Isabella died before the said Sir Samuel, without leaving issue. The said Robert Nicholly Auchmuty resided in the province of New York during the revolutionary war, within the British lines, and at that time served as an officer in. and afterwards for some time commanded a volunteer company of militia, called the Governor's War, in aid of the royal cause in the said war, and bore arms against the said United States until the peace hereinafter mentioned.

The said Robert Nicholls Auchmuty being an American loyalist, still adhering to his then Majesty, as his subject, embarked with the British troops when they evacuated

New York, pursuant to the treaty of peace between Great Britain and the United States of America, concluded in September, A.D. 1783, and arrised with the said British troops in England; and he continued to reside in England for about two years after his arrival therein aforesaid. That whilst he so resided in England, he was duly appointed by the British government secretary to a Board of Commissioners, in pursuance of the said treaty of peace, made in September, 1783, which Board sat in the city of New York. And that he went from England to the city of New York in the year 1785, under and by virtue of the said appointment. That after the determination of his said employment under the British government, he settled in the United States of America, married a British born subject, and had children; and that he continued to reside there until the time of his death, which took place in the year 1812. That at the time of his death the said Robert Nicholls Auchmuts left issue male four sons: viz., the abovenamed: lessors of the plaintiff, Samuel Overing Auchmuty; Robert Mulcaster Auchmuty, the said Richard Tylden Auchmuty, and the said Henry John Auchmuty, all of whom were born in the United States of America, subsequent to the recognition by Great Britain of the independence of that country, and after the said Robert Nicholls Auchmuty went to the said city of New York, under the said appointment as aforesaid. That the said four sons of the said Robert Nicholls Auchmuty, all survived the said Sir Samuel Auchmuty, who so died seised of the premises in question. That the said Robert Mulcaster Auchmuty died about the month of November, 1822, at Madras, without leaving any widow or issue, and without making any will to pass real estates. That the said Samuel Overing Auchmuty, Richard Tylden Auchmuty, and Henry John Auchmuty, are the lessors of the plaintiff in this action, and are the next heirs in gavelkind of the said Sir Samuel Auchmuty, who died so seised, if they can by law inherit the said premises from the said Sir Samuel Auch-

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muty. That the defendants, Juliana Mulcaster, and Jane, the wife of the said Richard Tylden, are the two only surviving sisters of the said Sir Samuel Auchmuty of the whole blood (his other sister Isabella having died before him); and took possession of the said premises subsequent to the day of the demise laid in the declaration, and evicted the lessors of the plaintiff. That they the defendants, Juliana Mulcaster, and Jane, the wife of the said Richard Tylden, quitted America, on its separation from the mother country, came to England, married British subjects, and have remained there to the present time. The said colony of New York, with other colonies in North America, separated themselves from the government and crown of Great Britain, and united themselves together on the 4th day of July, 1776, and declared themselves free and independent states by the name and style of "the United States of America." On the 3rd day of September, 1783, his late Majesty acknowledged the United States of America to be free and independent states; and on the said 3rd day of September, a definite treaty of peace was signed between his said Majesty and the United States of America, which treaty is as follows:-

Article 1st.—His Britannic Majesty acknowledges the said United States, viz.:—New Hampshire, Massachusetts' Bay, Rhode Island, Providence Plantations, Connecticut, New York, New Jersey, Pensylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina, and Georgia, to be free, sovereign, and independent states; that he treats with them as such, and for himself, his heirs, and successors, relinquishes all claim to the government and territorial rights of the same and every part thereof.

Article 3d.—It is agreed that the people of the United States, shall continue to enjoy unmolested, the right to take fish of every kind on the grand bank, and on all other banks of Newfoundland, also in the gulf of St. Lawrence, and all other places in the sea, where the inhabitants of both countries used at any time heretofore

to fish; and also that the inhabitants of the United States shall have liberty to take fish of every kind on such part of the coast of Newfoundland as British fishermen shall use (but not dry or cure the same on that island), and also on the coasts, bays, and creeks of all other of his Britannic Majesty's dominions in America, and that the American fishermen shall have liberty to dry and cure fish on any part of the unsettled bays, harbours, and creeks of Nova Scotia, Magdalen Islands, and Labrador, so long as the same shall remain unsettled; but so soon as the same or either of them shall be settled, it shall not be lawful for the said fishermen to dry or cure fish at such settlement without a previous agreement for that purpose with the inhabitants, proprietors, or possessors, of the ground.

Article 4th.—It is agreed that the creditors on either side shall meet with no lawful impediment to the recovery of the full value, in sterling money, of all bona side debts heretofore contracted.

Article 5th .- It is agreed that Congress shall earnestly recommend it to the legislatures of the respective states, to provide for the restitution of all estates, rights, and properties, which have been confiscated, belonging to real British subjects; and also of the estates, rights, and properties of persons resident in districts in the possession of his Majesty's arms, and who have not borne arms against the said United States, and that persons of any other description shall have free liberty to go to any part or parts of the thirteen United States, and therein to remain twelve months unmolested in their endeavours to obtain the restitution of such of their estates, rights, and properties, as may have been confiscated; and that Congress shall also earnestly recommend to the several estates a reconsideration and revision of all acts or laws regarding the premises, so as to render the said laws or acts perfectly consistent, not only with justice and equity, but with that spirit of conciliation which, on the return of the blessings of peace, should universally prevail; and that Congress

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shall earnestly recommend to the several states, that the estates, rights, and properties of such last-mentioned periods shall be restored to them, they refunding to any period son who may be now in possession the boas ade price (where any has been given), which such persons may have paid on purchasing any of the lands, rights, and properties, since the confiscation; and it is agreed that all persons, who have any interest in confiscated lands, either by debts, marriage settlements, or otherwise, shall meet with no lawful impediment to the prosecution of their just rights:

Article 6th.—That there shall be no future confiscations made, or any prosecutions commenced against any person or persons, for or by reason of the part which he or they may have taken in the present war; and that no person shall on that account suffer any future loss or damage either in his person, liberty, or property; and that those who may be in confinement on such charges, at the time of the ratification of the said treaty in America, shall be immediately set at liberty, and the prosecutions so commenced be discontinued.

Article 7th.—There shall be a firm and perpetual peace with his Britannic Majesty and the said states, and between the subjects of the one, and the citizens of the other, wherefore all hostilities both by land and sea shall from henceforth cease; prisoners on both sides shall be set at liberty; and his Britannic Majesty shall, with all convenient speed, and without oausing any destruction or carrying away negroes, or other property of the Americant independents, withdraw all his armies, garrisons, and floots from the United States, and from every port, place, and harbour within the same, leaving in all fortifications' the American artillery that may be therein, and shall also order and cause all archives, records, deeds, and papers, belonging to the said states or their citizens, which, in the course of the war may have fallen into the hands of his officers, to be forthwith restored and delivered to the proper states or persons to whom they belong.

The question for the opinion of the Court, is, whether the descess of the plaintiff, or any or either of them; are estifled to recover the said premises in question? If the Court shall be of opinion that they are, then the verdict is to stand. If not, them a nonsuit is to be entered.

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Chiefly, for the lessors of the plaintiff. The question is, whether the lessers of the plaintiff, being born after the acknowledgment of the independence of the United Strates of America under the circumstances mentioned in the case, are entitled to inherit land in England. It is submitted that they have heritable blood in them, and by force of the statute 4 Geo. 2, c. 21, are entitled to recover in this ejectment, as being persons whose father was a neatural born subject of the crown of Great Buitain at the time of their birth... If R. N. Auchmuty, their father, is to be considered as a natural born subject at the time of their births then there is no doubt of their right to recover by virtue of the above-mentioned statute. This case is perfectly distinguishable from Doe v. Acklam (a). In that case, it was held, that Thomas Ludlow, the father of the claimant, had coased to be a subject of the crown of Great Britain, and had become an alien thereunto before the high of his daughter, Mrs. Thomas, the lessor of the plaintiff. .. Here Mr. R. N. Auchmuty never ceased to be a natural born subject of the crown of Great Britain. Throughout the whole of the revolutionary war, he comtipped his attachment to the British government, and bore arms in the royal cause, until the peace between America and the mother-country was concluded... After that time, he was employed by the British government in an official situation; and after the determination of his employment under the grown, he settled in the United States of America, and married a British born subject, by whom he had the lessors of the plaintiff, who were bem after the declaration of independence. It must

<sup>(</sup>a) Auto, vol. iv.,:894. 2 B. & C. 779.

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be made out on the other side, that the father of the lessors of the plaintiff had ceased to be a natural born subject at the time of their birth, before their title can be barred on the ground of alienage. Now when did he cease to be a British subject? It is clear that to the very last he adhered to the royal cause, and did not settle in America until after the declaration of independence, and until after his employment under the crown had terminated. So that, in fact, he never ceased to be a British subject, and consequently, his children have not lost their heritable blood. It cannot be denied, that if the children were born before the American war broke out, and whilst the two countries were at amity, they would be entitled to inherit from their father; surely, then, the circumstances of their being born after the war, will not work a forfeiture of those rights which they would previously have had, as being the children of natural born British subjects. At the time of their birth, the lessors of the plaintiff were the children of a person who still preserved the character of a natural born subject of Great Britain; and therefore, by operation of the statute 4 Geo. 2, c. 21, are entitled to maintain this ejectment. That statute was passed to explain the 3d section of 7 Anne, c. 5, for naturalizing foreign Protestants; and, after reciting that section, whereby it was enacted, that the children of all natural born subjects, born out of the liegance of her majesty. should be deemed, adjudged, and taken to be natural born subjects of this kingdom, to all intents, constructions, and purposes whatsoever, it proceeded to enact, "that all children born out of the liegance of the crown of England or of Great Britain, or which shall hereafter be born out of such liegance, whose fathers were or shall be natural born subjects of the crown of England or Great Britain, at the time of the birth of such children, respectively, shall and may, by virtue of the said recited clause in the said act of the 7 Anne, and of this present act, be adjudged and taken to be, and all such children

are hereby declared to be, natural born subjects of the crown of Great Britain, to all intents, constructions, and purposes whatsoever." Indeed, the doctrine of the common law is very similar to that which is thus enacted by the legislature, for in Bacon v. Bacon (a), it was held, that the daughter of a British merchant, who went abroad and settled in the Prussian dominions, and there married the daughter of an Englishman, by whom he had the plaintiff. was born a denizen, and was heir to her father, so as to take land by descent in this country. Some stress will be laid by the other side, upon the statement in the case, that after the determination of R. N. Auchmuty's employment under the British government, he settled in the United States of America. Now there is no magic in the word settled. It does not import any renunciation of the character of a British born subject, nor does it deprive the party settling of any incident belonging to his original status. As well might it be said, that an Englishman, by going over to France, taking a house, purchasing an estate, marrying and settling there, would thereby lose his character of a British born subject, and prevent his communicating heritable blood to his children born in France. This would be a monstrous proposition, and would be in direct violation, not only of the statute 4 Geo. 2, c. 21, but of the common law (b). The father of the lessors of the plaintiff never lost his character of a British born subject; to the last he retained his original condition, by adhering to the crown of Great Britain, and therefore his children come within the express terms of the statute.

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Abraham, contrà. The lessors of the plaintiff having been born in America, after the British colonies in that country had thrown off their allegiance, and after the king of this country had recognised them as a free, sovereign, and independent nation, are to be considered as aliens,

<sup>(</sup>a) Cro. Car. 601.

<sup>(</sup>b) See the Judgments of Sir W. Scott, in 3 Rob. 41. 5 Ib. 90.

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and therefore, cannot inherit land in England. The question submitted to the determination of the Court may be considered in two points of view: first, as respects the condition of these children by the common law; and, second, the effect which the statute law has upon their heritable qualities. First, it is clea primâ facie, that by the common law, as laid down in Calvin's case (a), these children are aliens, for it will not be disputed that at the time they were born, America was a free, sovereign, and independent state, and that the inhabitants thereof did not owe any allegiance to the King of Great Britain; and therefore, being born out of the liegance of the king, they are aliens, and cannot inherit land in this country. Co. Lit. 129 (a), Com. Dig. tit. Alien. Second, the statute law, it is submitted, does not help the argument on the other side, for at the time the lessors of the plaintiff were born, their father had lost his character of a natural born British subject. After the declaration of American independence, he became a settled inhabitant of the United States; he is found adhering to the American government. and is, to all intents and purposes, to be considered as a citizen of the United States. [Abbott, C. J. That is not found in the case.—Bayley, J. It does not follow that because he settled in America, after the British colonies in that country were declared independent, he became a citizen of the United States. He might still retain his national character, of a British subject, in contradistinction to that of an American citizen]. At the time of the birth of these children he was settled in America, he had renounced his previous national character, and died as a settled inhabitant of that country. [Abbott, C. J. We can give no such force to the word settled as you contend for.—Bauleu. J. If a British subject should go and settle in America, his national character must be determined by the same rule as if he were to settle in any other country; therefore, his settling in America would produce no more operation upon

his national character, than if he went to settle in Germany, or Italy]. Still, however, it is submitted that his children being born out of the liegance of the king of this country, would cease to be natural born subjects, and would have all the consequences of alienage attaching to them. [Bayley, J. Suppose, at the peace of 1815, a British born subject went to settle in France, and had children born there, can it be denied that those children would be natural born subjects of the crown of Great Britain, within the meaning of the 4 Geo. 2, c. 21?] It being found in the language of this case, that the father of the lessors of the plaintiff went to America and settled there, and continued there until the time of his death, his character of British subject was gone by the declaration of American independence, and ipso facto he became an alien. There was no animus revertendi; he became, to all intents and purposes, a citizen of the United States. [Abbott, C. J. Suppose the father of the lessor of the plaintiff had himself been seised of an estate in England, could the crown have taken it from him on the ground of his being settled in America?]. That question does not properly arise in this case. It is sufficient, here, to say, that the lessors of the plaintiff being born out of the liegance of the king, they have no heritable blood through their father; who, at the time of their birth, was a settled inhabitant and subject of the United States. [Abbott, C. J. Settled is a very ambiguous phrase]. According to the definition of lexicographers, it means, to fix in any place; to establish; to fix unalienably, by legal sanction; to fix inseparably; to take any lasting state. The father having settled in America, after the acknowledgment of its independence, and the children being born afterwards in that country, it is contended the lessors of the plaintiff are aliens, and cannot inherit land in England. [Abbott, C. J. It appears to me that the case is within the very words of the act 4 Geo. 2, c. 21.—Bayley, J. the treaty, the king acknowledges all the United States

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to be free, sovereign, and independent states. Who are made independent?—The states. Does not that mean the persons who at that time composed the American states? They are divested of their allegiance to the crown of this kingdom, and are put into the condition of a new allegiance to another government; but does that enable a British subject, at any future period, to divest himself of his allegiance to the crown of this country? The case of Doe v. Acklam proceeded on the foundation, that before the birth of the child, the father ceased to be a British subject].

Chitty, in reply, was stopped by the Court.

ABBOTT, C. J.—I am clearly of opinion, that the lessors of the plaintiff are precisely in the situation provided for by the statute 4 Geo. 2, c. 21; namely, as being persons "whose father was a natural born subject of the crown of Great Britain, at the time of their birth;" and consequently, by force of that statute, have a right to inherit lands in England.

BAILEY, J.—This case is perfectly distinguishable from There, the father of the lessor of the Doe v. Acklam. plaintiff had ceased to be a natural born subject of the crown of Great Britain at the time of her birth; here, the father of the lessors of the plaintiff retained his character of a British subject at the time they were born. treaty between the mother-country and the American colonies, made the latter an independent state and government; that is to say, it made those persons who were at that period of time adhering to the then American government or constituted authorities, free of their allegiance to the crown of these kingdoms, and left them to adopt their allegiance to the new government; but if, after that period of time, persons continued owing allegiance to the crown of these kingdoms, the treaty did not entitle such persons

to put an end to their allegiance at any future, distant, period of time. Now in this case, Robert Nicholls Auchmuty, the father of the lessors of the plaintiff, adhered to his allegiance after the separation of the American colonies from the mother-country. He, therefore, stood in the situation of any other natural born British subject, who had gone to settle in France, Germany, Italy, or any other foreign country, and had children there, who, would undoubtedly be within the protection of the The father of the lessors of the 4 Geo. 2, c. 21. plaintiff, being a natural born British subject at the time of their birth, they are clearly entitled to inherit lands by descent in England. I think they would have a right to do so by operation of the statute 7 Ann. c. 5. s. 3; but I am quite satisfied that they come within the protection of the 4 Geo. 2, c. 21, and are therefore entitled to judgment.

HOLROYD, J,-In this case, both the father and mother of the lessors of the plaintiff, were natural born subjects of the British crown; and the lessors of the plaintiff would come, I think, within the operation of the statute of Ann. It is true that persons born out of the king's allegiance would not, by the common law, have any heritable blood; but the statute of Geo. 2, makes them have heritable blood through their father and mother, if, at the time of the birth, their father and mother were natural born British subjects. Here the parents of the lessors of the plaintiff were both natural born subjects at the time the latter were born. After the separation of the American states from the mother-country, the father of the lessors of the plaintiff continued his allegiance to the crown as a natural born British subject, and therefore was in a condition to communicate heritable blood to his children. I am clearly of opinion, that the circumstance of his settling in America. and taking up his domicile there, did not ipso facto make him a citizen of the United States, and put an end to his

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9826. AUCEMUTY v. Mulcaster. allegiance to the crown of Great Britain. On these grounds, I am of opinion that judgment must be given for the plaintiff.

LITTLEDALE, J., was gone to chambers.

Postea to the plaintiff.

Wednesday, June 14th.

Where the return to a writ of latitat defendant, upon being arrested in his own house, was confined to his bed by illness, and could not be removed without danger to his life, and so continued ill at and after the return of the writ, and for such cause the custody of the defendant was relinquished; the Court refused to graut an attachment against the sheriff, and allowed him to amend his return upon' payment of

costs.

#### BAKER v. DAVENPORT.

STEER, shewed cause against a rule obtained on a former day, by R. V. Richards, for quashing the return stated that the made by the sheriff of Derby to a writ of latitat; and why a writ of attachment should not issue against him, for not bringing in the body pursuant to the said writ. return stated, that on the 9th of February, the officer to whom the warrant was directed, proceeded to the dwelling house of the defendant, and found him confined to his bed by paralysis, and suffering under a severe affection of the spine, and so ill as to be in an unfit state to be removed from his bed without the greatest danger and peril to his life; and that the officer remained in the house of the defendant until and after the return of the writ. when finding that the defendant continued in such a state of health, as not to be fit to be removed without the greatest danger and peril of his life, he thereupon relinquished the custody of the said defendant. these circumstances, it was contended that the return was sufficient, and the case of Cavenagh v. Collett (a), was cited as an authority in point. In that case, the return to the writ stated that the defendant was insane, and could not be removed without great danger, and continued so till the return of the writ, and the Court refused an attachment against the sheriff. [Abbott, C. J. That is a very different case from the present. In that case, the

(a) 4 B. & A. 279.

sheriff must have entered a lunatic asylum, and the defendant being raving mad, the officer could not have removed him without danger to his own life. Bayley, J. Here there was no occasion for the officer to have relinquished the custody of the defendant, for he might have kept him until he got better].

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# R. V. Richards, was stopped by the Court.

ABBOTT, C. J.—All the relief we can give the sheriff, is to allow him to amend his return upon payment of costs, making such other return as he shall be advised.

Rule discharged upon payment of costs.

## GLOVER V. WHATMORE.

On shewing cause agains a rule nisi for setting aside the judgment and execution in this case for irregularity, with costs, the facts disclosed on the affidavits were lar of plaintthese:—The writ being returnable on the 20th April, the defendant's attorney on the 21st, obtained a Judge's order four days for a particular of the plaintiff's demand; and on the 22nd, the plaintiff filed a declaration de bene esse in debt, and served notice thereof at the defendant's residence. On the 2nd May, a bill of particulars was delivered to the defendant's attorney, and on the 3rd, the plaintiff's attorney filed common bail for the defendant, pursuant to the statute. In the afternoon of the 2nd May, the defendant's to take out a attorney took out a summons at the Judges' chambers, for third sum-

Where a summons for a better particuiff's demand, was served before defendant's time for pleading was out, and the plaintiff had neglected to give a better particular, which rendered it necessary second and a mons, which

last was attended and discharged, and in the meantime, the defendant's time for pleading had expired, and therefore the plaintiff signed judgment for want of a plea, and took out execution: -Held, that the plaintiff's proceedings were irregular.

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a better particular of demand, and served a copy of the same on the plaintiff's attorney, which the latter neglected to attend. A second and third summons for the like purpose were taken out for the third and fifth of May respectively, which latter the plaintiff's attorney attended, when the Judge refused to make any order. Upon this summons being discharged, the plaintiff's attorney signed judgment as for want of a plea, and sued out a capias ad satisfaciendum, and served the defendant's attorney with notice thereof, on the 8th May. The alleged irregularity in the plaintiff's proceedings was, that the defendant, as was contended, had four days to plead from the return day of the last summons, and consequently, that the plaintiff was not in a condition to sign judgment until the 9th May.

Archbold now shewed cause, and contended, on the authority of St. Handaire v. Byam (a), that the plaintiff's proceedings were regular, for there it was held, that a rule nisi for setting aside bailable process, "with a stay of proceedings," does not enlarge the time for the defendant to put in and perfect his bail, until the rule is disposed of, so as to place him in the same situation as he was in, at the time the rule nisi was granted. By analogy, that case was in point with the present.

Gurney, contra, was stopped by the Court.

ABBOTT, C. J.—That case does not bear upon the present, for here the plaintiff is himself in fault, by being the cause of delaying the defendant's proceedings. Here, the plaintiff neglects to deliver a bill of particulars, from the 21st April until the 2nd May, and does not attend the first and second summonses for better particulars, which deprives him of any favour from the Court; it appears to us, therefore, that the judgment was signed too soon, and that this rule must be made absolute.

The other Judges concurred.

Rule absolute.

(a) Ante, vol. vii., 458; 4 B. & C. 970.

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#### HERBERT v. TAYLOR.

DEBT on bond. Defendant pleaded the general issue nil debit, and delivered the same to the plaintiff's attorney. To this plea the plaintiff demurred generally, and his attorney delivered the issue on the demurrer to the defendant's attorney, without filing the demurrer with the clerk of the papers, and obtained a rule for a concilium, and for judgment on the demurrer. Chitty, on a former day, obtained a rule nisi for setting aside the rule for a concilium, and the delivery of the issue for irregularity, the alleged irregularity being, that the demurrer ought to have to the opposite been filed with the clerk of the papers.

Marryatt and Archbold now shewed cause. The question is, whether, in the case of a general demurrer to a plea of nil debet to an action upon a bond, the demurrer book is to be filed with the clerk of the papers, or whether it is sufficient if it be made up by the plaintiff's attorney? It is submitted that, by the practice of this Court, general pleas and general demurrers may be delivered by the attornies; and that it is only special pleas and special demurrers that are required to be filed with the clerk of the papers. By the rule of Court, Mich. 2 W. & M., no attorney shall presume to deliver to any other attorney, or receive from any other attorney, any special plea, which ought to be filed in the office of the clerk of the papers, or a copy of such plea, before such plea shall be put into the office of the clerk of the papers. Now a general issue does not come within this rule. Previous to that rule, the issues were always made up by the attorney, and the pleadings delivered by him to the attorney on the other In a note to rule Trinity 12 W. 3, by Sir George Cooke, prothonotary of C. P., in his edition of the Rules of Court, 1747, it is said, "The attornies of this Court make up the issue and demurrer books in the following cases:

By the practice of this Court, on a general demurrer to a plea of nil debet, in an action upon a bond, the paper book may be made up and delivered by the plaintiff's attorney attorney, and need not be filed with the clerk of the papers.

## CASES IN THE KING'S BENCH,

1826. HERBERT v. TAYLOB. viz.; every issue may be given on the book side; not guilty to a new assignment; the bar of son frank tenements; comperuit ad diem to a sheriff's bond; nul tiel record to an action of debt on a judgment; a general demurrer to a declaration; in covenant, where the defendant in his bar concludeth to the country; every special non est factum; every son assault demesne; and likewise all issues and demurrers upon writs of error, scire facias, and audita querela, and all repleaders, or other things formerly entered of record. In all other cases, both by bill and original, the special pleadings are to be left with the clerks of the papers, who make copies thereof; and when issue is joined, the paper books are made up by them." This rule of practice is also laid down in Crompton and Sellon. It is obvious that the rule of Court, Trin. 12 W. 3, makes a distinction between general and special pleas and demurrers. In Hilary, 1817(a), it was ruled, that a general demurrer, in all cases except to a special plea, must be delivered to the attorney of the opposite side, and not filed.

Chitty, contrà. It is true that, by the rule of Court Trin. 12 W. 3, the attornies are to make out all issues and demurrers, upon writs of error, scire facias, and audita querela, and repleaders or other matters formerly entered of record; but Mr. Tidd, in his Practice, 8 ed. 774, adds, that "in all other cases, both by bill and original, in K. B., the issue, or, as it is commonly called, the paper book, or upon an issue in law, the demurrer book is made up by the clerk of the papers." And certainly the uniform practice has been to observe this rule. A general demurrer to a plea must be signed by counsel. That of itself shews that it is of a special nature, and ought not to be merely delivered.

Cur'. adv. vult.

ABBOTT, C. J., now delivered the judgment of the Court.
(a) 2 Archbold's Practice, 6. 2nd ed.

The point in this case was, whether the plaintiff's attorney was at liberty to make up and deliver the paper book. We have looked into the practice of the Court, and we are of opinion, that in such a case as this, he was at liberty to make up and deliver the paper book. The rule, therefore, must be discharged.

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Archbold then prayed judgment for the plaintiff upon the demurrer, which was given accordingly.

# EVANS v. ROBERTS (a).

THIS was an action of indebitatus assumpsit, for a cover of potatoes bargained and sold. Plea, the general issue. At the trial before Garrow, B., at the last Lent assizes for the county of Monmouth, it appeared in evidence that the defendant, on the 25th September, 1825, agreed by parol with the plaintiff, to purchase a cover of potatoes then growing on land of the plaintiff, at the price of 51., and the defendant paid one shilling earnest. Some dispute arose as to who should raise the potatoes, and the plaintiff agreed that he should dig them up. The defendant agreed to come and take them away before Christmas following. At the ing them, time the potatoes in question were sold, potatoes of the same quality were selling in the market at 12s. per sack, the fourth secand in a month afterwards they fell to 8s.; and the defendant having neglected to take the potatoes pursuant to his Frauds. agreement, the present action was brought. It was objected on the part of the defendant, that the agreement imported the sale of an interest in or concerning land, and

A contract for the sale of a growing cover of potatoes, to be dug by the vendor, and carried by the vendee, when at maturity, is not a contract or sale of lands, tenements, or hereditaments, or any interest in or concernwithin the meaning of tion of the Statute of

(a) Pursuant to the King's warrant, issued ten days before the end of Trinity term, by virtue of the statute 3 Geo. iv. c. 102, the judges of this court sat at Westminster, from the 15th until the 24th June inclusively; and then again from the 30th October until the 4th November inclusively. The cases marked with an asterisk in the following pages, were decided at those sittings.

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not being in writing, was void within the Statute of Frauds, 29 Car. 2, c. 3, s. 4; but the learned Judge was of opinion, that inasmuch as the vendor was to take up the potatoes, it must be considered merely as a contract for the sale and delivery of goods and chattels, within the meaning of the 17th section of the same statute; and therefore, under his Lordship's direction, the plaintiff had a verdict for 4l. 19s., with liberty to the defendant to move to enter a nonsuit.

Ludlow, in Easter term, having obtained a rule nisi to enter a nonsuit,

Justice now shewed cause. This case is clearly not within the 4th section of the Statute of Frauds, for it cannot be pretended that the defendant acquired any interest in the land upon which the potatoes grew. The cases upon the statute have already gone far enough, and the Court will not be inclined to extend its construction to a case of this nature. The land in this case was, in fact, no more than a warehouse, for the purpose of keeping the potatoes until it suited the defendant's convenience to take them away. Under the agreement, the defendant acquired no right of occupation in the land, still less had he any interest in the growing produce. This is not like the case of Crosby v. Wadsworth (a), where the contract was for growing grass to be made into hay, and which was to remain on the land in order that it might ripen for that pur-There the party was the grantee vesture terræ or herbagii terræ, and might, according to Co. Litt. 4 b, maintain trespass quare clausum fregit, although he had not the soil; but here no such rule applies, because the defendant had neither the exclusive right of possession, nor any such interest in the growing produce of the soil as would bring the case within the operation of the 4th section of the statute. This case must be governed by Warwick v. Bruce (b), and Parker v. Staniland (c), both of which

<sup>(</sup>a) 6 East, 602.

<sup>(</sup>b) 2 M. & S. 205.

<sup>(</sup>c) 11 East, 362.

were precisely analogous in their circumstances to this case, both having reference to a contract for the sale of potatoes growing on the land. Here the Court stopped him, and called upon

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Ludlow, contrà. At the time of the agreement in question, the potatoes were growing on the land, and were to remain in the soil until it suited the convenience of the defendant to take them away, provided they were carried before Christmas. According, therefore, to the authority of Crosby v. Wadsworth, and Parker v. Staniland, the vendee had an interest in, or concerning the land, within the meaning of the 4th section of the Statute of Frauds. It is not necessary that the party should have a title to the land; it is sufficient if he have a beneficial interest in it. so as to entitle him to enter for the purpose of taking the produce. The cases of Waddington v. Bristow (a), and Emerson v. Heelis (b), are authorities to shew that the bare right to have the subject matter of the sale continue in the land, constitutes an interest in the soil. The former was the case of the sale of a quantity of hops, which should be grown on a certain number of acres of land, to be delivered in pockets at a certain place; and there Heath, J., said, "the subject matter of the agreement must be taken with reference to the time at which the contract was made. Now, at that time, the hops did not exist in the state of goods, wares, and merchandize." The case of Emerson v. Heelis decided, that a sale of growing turnips, no time being stipulated for the removal, and the degree of their maturity not being positively found, is a sale of an interest in land within the 4th section of the Statute of Frauds, and must be in writing. [Bayley, J. Could you. not have taken these potatoes under an execution against the goods of the party growing them?] It is submitted that they would stand on the same footing as growing corn; but without going to that extent, it is sufficient

<sup>(</sup>a) 2 B. & P. 452

<sup>(</sup>b) 2 Taunt. 38.

EVANS v. ROBERTS. here to make out that inasmuch as these potatoes were growing, and continuing to derive succour from the land, whilst they were the property of the defendant, he had such an interest in the soil, as to bring this contract within the meaning of the 4th section of the Statute of Frauds.

BAYLEY, J.—It seems to me, that this is to be considered as a contract for the sale and delivery of what, at the time of the contract, were goods and chattels. clearly not a contract for an interest in land. The bargain was, that the defendant should have all the cover of potatoes which the land in question should produce (the potatoes being, as I will take it for the purpose of the argument, in a growing state), the owner of the land to get them out of the ground, and the defendant to carry them away. Now, that contract does not, as it seems to me, give to this defendant any interest in the land. He has no right to any possession of the land; the only thing for which he has bargained is, that he shall have the potatoes delivered to him when their growth shall be complete. The cases which have been relied upon in the course of the argument, are either distinguishable from the present, or, where not distinguishable, are in favour of the construction which the Court is now putting upon the Statute of Frauds. In Crosby v. Wadsworth (a), the contract was clearly for the sale of an interest in the land. There the grass was growing, and the vendee was to mow it, and convert it into hay. He had the whole of the vesture of the land, and he had the exclusive possession of the soil, from the date of the contract until the period when the grass should be cut and made into hay. Grass growing in a natural state, stands on a very different footing from produce which is obtained from land by artificial means, or by the application of a particular course of husbandry. Grass is the natural growth and produce of the land itself, permanently remaining, not exhausted when

once cut, but constantly growing and renewing. It cannot be seized in execution under a fieri facias, as goods and chattels. Upon the death of the owner of the land, it goes to the heir, and not to his executor or personal representative. But in the case of growing potatoes, which are the artificial produce of the land, arising from a particular course of husbandry, they come within the description of emblements, and go, not the heir, but to the executor, and they may be seized in execution under a writ of fieri facias. That writ goes against the goods and chattels of the party, and therefore, whatever the executor would be entitled to take as goods and chattels, may be seized by the sheriff. Now, the potatoes in this case might, in my opinion, be seized under a writ of fieri facias; and whether at the time of the contract they were in a growing state, or in a warehouse, it seems to me that they are to be considered as what the law designates goods and chattels. If that be so, then they are not within the provision of that section of the 29 Car. 2, c. 3, which relates to the sale of an interest in land. In the case of Parker v. Staniland (a), the potatoes were clearly considered as goods and chattels, and not amounting to an interest in land. I agree that that case is distinguishable from the present, because there the potatoes had ceased to grow. The case of Warwick v. Bruce, is also distinguishable from this in the same particular; but I think the reasoning of Lord Ellenborough, in the latter case, is extremely important in assisting us in coming to a right conclusion, when forming a judgment as to the effect of that clause of the Statute of Frauds, which speaks of an interest in lands, tenements, or hereditaments. there says, "as to the last objection, if this had been a

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(a) 11 East, 362.

contract conferring an exclusive right to the land for a time, for the purpose of making a profit of the growing surface, it would be a contract for the sale of an interest in, or concerning lands, and would then fall unquestionEvans v. Roberts.

ably within the range of Crosby v. Wadsworth. But here is a contract for the sale of potatoes at so much per acre; the potatoes are the subject matter of sale, and whether at the time of sale they were covered with earth in the field, or in a box, still it was a sale of a mere chattel. It falls, therefore, within the case of Parker v. Staniland, and that disposes of the point on the Statute of Frauds." It does not appear that the other Judges, in giving judgment, made any observations upon that point; but it is clear that my Lord Ellenborough's judgment proceeded upon the ground, that if the contract gave to the vendee no right to the land, for the purpose of enabling him to make a profit of the growing surface, then it was not to be considered as giving him an interest in the land, but merely in a chattel. Now, trying this case by that test, there is nothing but a contract for the sale and delivery at a future period, of that, which at a future period would be in a perfect state, as goods and chattels. The case of Emerson v. Heelis (a), was one in which there was some degree of difficulty, and there is, no doubt. a distinction between this and that; but it is a very nice distinction. It may, indeed, be doubted, whether there is any substantial difference between the two cases. That was a contract for the sale of growing turnips, no time being stipulated for their removal, and the degree of their maturity not being positively found; and the Court held, that that was the sale of an interest in land within the 29 C. 2, c. 3, s. 4, and must be in writing. The turnips, it is to be observed, were sold by public auction. Now, in that case, it was not necessary to decide the point upon the Statute of Frauds, because there was another point in favour of the plaintiff, which rendered a decision upon the first question perfectly unnecessary, for the contract being signed by the auctioneer as the agent of the buyer, was equally binding whether it was for a sale of goods and chattels, or of an interest in land. In that case, undoubtedly, Mansfield, C. J., seems to have considered that the sale of the turnips was a sale of an interest in the land. On the 25th September, the plaintiff put up to sale by public auction, a crop of turnips, then growing upon his land, in separate lots, and under certain conditions of sale. The defendant by his agent, who was his farming-servant, attended at the sale, and being the highest bidder, was declared the purchaser of 27 different lots, and the name of the defendant was written in the sale-bill by the auctioneer, opposite each particular lot for which he had been declared In giving judgment, Sir James the highest bidder. Mansfield says, "now as to this being an interest in land, we do not see how it can be distinguished from the case of hops, decided in this Court, and if the auctioneer is an agent for the purchaser, then the Statute of Frauds is satisfied, because the memorandum in writing is signed by an agent for the party to be charged." Upon the questions which he was then considering, his opinion upon the point, whether the case came within the 4th section of the Statute of Frauds, was wholly unnecessary to be given, because in the very outset the principal question was, whether the contract should be in writing, as being for a sale of goods amounting to 101.; and he answers the objection upon that ground, by saying that there was no pretence for it, inasmuch as the contract for each stitch of turnips was a separate sale, each being under 101. He then goes to the next question, namely, whether it was the sale of an interest in land, and if so, whether the signing by the auctioneer was a signing by an agent for the purchaser; and he then goes on to shew that it was a sufficient signing. But then he says, that as to its being an interest in land, the Court could not see how it could be distinguished from the case of hops, decided in that Court. That was the case of Waddington v. Bristow (a), and, therefore, it is necessary to consider whether the two cases are or are not similar, or may not be distinguished from each other. In Waddington v.

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Bristow, a contract was made in November, 1799, for all the hops which should be grown in the ensuing year, on a given number of acres of land. Every body acquainted with the cultivation of hops knows, that in the month of November, the crop is entirely taken off, and the bind severed from the roots; and, therefore, a bargain made at that period of the year, must have reference to the new crop in the following year. In the course of the following spring, the bind shoots out from the root, during the summer it flowers, and finally produces the hop. Therefore, in the month of November, 1799, when the bargain was made, there was nothing which could be called hop but the root, and it is quite clear that the party was not to have the root, but what in common parlance should come to be hops; the hops sold not being in existence at that time. It was exactly like the case of selling a quantity of apples, of the growth of the ensuing year, the hops being no more in existence than the apples. The question in that case was, not whether the agreement, which was in writing, was for an interest in the land, but it was insisted that it was not binding. Why? Because it was said, that the contract was for the sale of goods, wares, and merchandize, and therefore ought to be stamped. On the other hand it was contended, that a stamp was not required, because it came within the exception of the Stamp Act, which exempts from the stamp duty all contracts for the sale of goods, wares, and merchandize; and the Court was of opinion, that the contract was not an agreement for the sale of goods, wares, and merchandize within the exemption of the 23 Geo. 3, c. 28, s. 4; and the Judges gave different reasons for their judgment. Lord Alvanley thought it was an agreement for the sale of goods, wares, and merchandize, and something more, because the plaintiff had agreed to sell the whole produce of the land, in a certain state, at the time of the delivery. Mr. Justice Heath thought that the subject-matter of the agreement must be taken with reference to the time at

which the contract was made; and at that time the hope did not exist in the state of goods, wares, and merchandize, so as to bring the case within the exception of the statute. Mr. Justice Rooke said, that the object of the legislature in introducing the exception into the Stamp Act, was to prevent the duty which had been imposed by a: prior section, upon all agreements generally, from impeding ordinary commercial transactions; but the subject of the agreement before the Court was a speculative bargain, relative to things not in esse, at the time when the contract was made; and, therefore, it did not appear to him to fall within the meaning of the exception. Mr. Justice Chambre was the only Judge who gave any opinion as to the bargain giving the vendee an interest in land. He certainly stated that the contract gave the vendee an interest in the whole produce on that part of the vendor's farm, which consisted of hop-grounds, and he added, "if the vendor had grabbed up the hops, or had refused to gather or dry them, it would have been a breach of the contract. Though I admit that a contract for the sale of so many hops as 22 acres might produce, to be delivered at a distant day, might fall within the exemption of the act, notwithstanding the hops were not in the state of goods, wares, and merchandize, at the time the contract was made, yet I cannot think the present agreement within that exemption, since it gives an interest to the vendee in the produce of the vendor's land." That learned Judge, however, is the only one who decides that the agreement conveyed an interest in the vendor's land. I confess, I think the opinions of Mr. Justice Chambre, in that case, and of Sir James Mansfield, in Emerson v. Heelis, do not warrant us in coming to the conclusion, that this contract gave the party such an interest in land as brings it within the meaning of the 4th section of the Statute of Frauds. I have already stated that, as between heir and executor, these potatoes would not go to the former, but to the latter. It is urged, that the bare right to have the potatoes remain in the ground, is itself an

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interest in the ground. I do not concur in that proposition. A person entitled to emblements has the same right, and yet he is not, by virtue of that right, considered to have any interest in the land, inasmuch as the land goes to the heir, and the emblements to the executor. There are several cases which shew that the sheriff may sell leases or terms for years, and fructus industriales, as corn growing, which goes to the executor (a), or fixtures, which may be removed by the tenant (b). He cannot, however, seize furnaces and fixtures, or apples upon trees, which belong to the freehold and go to the heir (c). There are, however, many authorities upon the distinction between such things as go to the executor, and such as go to the heir, to which it is not necessary for me to refer. stat. 56 Geo. 3, c. 50, which relates to the manner in which growing crops shall be sold, is, indeed, a legislative declaration, that growing crops may be seized and taken in execution under a fieri facias, which is an implied recognition of the right to take them in execution at common law, as goods and chattels. In the late case of Mayfield v. Wadsley (d), the Court were of opinion, that where there was a sale of growing crops distinct from any letting, it did not convey any interest in the land, but was to be considered merely as a sale of goods and chattels. On the whole, therefore, it appears to me that this was a contract not within the meaning of the 4th section of the Statute of Frauds, conveying any interest in land, but was a contract for the sale of goods, wares, and merchandize, within the meaning of the 17th section of the same statute, though not to an amount which requires a note or memorandum of the contract in writing. The rule obtained by the defendant must, consequently, be discharged.

HOLROYD, J.—I am also of opinion, that this rule must

<sup>(</sup>a) Gilb. Exec. 19, 1 Salk. 368. 25, ante vol. 1, 247.

<sup>(</sup>b) Salk. 368, 3 Atk. 30. (d) Ante, vol. v., 224. 3 B. &

<sup>(</sup>c) Gilb. Exec. 19, 5 B. & A. C. 357:

be discharged. I think this is to be considered as a bargain and sale of goods, to be delivered upon request at a future period. Although the vendee might derive some benefit from the land, by reason of the articles sold continuing upon it until they arrived at maturity, yet that does not give him any interest in the land within the meaning of the Statute of Frauds. This appears to be the sale, not of any specific part of the produce of the land, but of so many potatoes as amounted to a cover; and if the vendor delivered so many as amounted to that quantity, he would have performed his contract. But even supposing the bargain to be for the produce of a particular and specific quantity of land, still, as the vendor was to raise the potatoes, the defendant would have no right to go upon the land, for any other purpose than to take them away after they were raised. He would have no right to any possession of the land itself for any time whatever. The contract seems to me to be no more than this; that the vendor shall sell and deliver at a future time, upon the request of the vendee, a certain quantity of potatoes, which are to be separated from the land by the vendor. The reasoning of Lord Ellenborough in Parker v. Staniland (a), is very applicable to this case. There it was argued, that the defendant was entitled to the possession of the close until the crop was taken; for without that, the contract could not have been executed; and, therefore, he must have been entitled to all the possessory remedies against a wrong doer invading his possession. To that argument Lord Ellenborough answered, "The lessee primæ vesturæ may maintain trespass quare clausum fregit, or ejectment for injuries to his possessory right: but this defendant could not have maintained either; for he had no right to the possession of the close; he had only an easement, a right to come upon the land, for the purpose of taking up and conveying away the potatoes; but that gave him no interest in the soil." That case is cited and . (a) 11 East, 366.

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relied upon in the last edition of Selwyn's Nisi Prius, 2 vol. 837. In the present case, the potatoes were be to taken up from the ground by the vendor, and not by the vendee, which makes it still stronger than that cited. Emerson v. Heelis (a), the sale was of a crop of growing twenips, and, therefore, not fit for delivery at the time of the contract, and as the vendee was not to pay for them until January, they might have continued to grow until that In Poulter v. Killingbeck (b), an action of indebitatus assumpsit, with a count on the quantum meruit, was brought for moieties of crops of wheat sold by the plaintiff to the defendant, and accordingly reaped for his, the defendant's, own use. It appeared that the plaintiff, by a parol agreement, had let land to the defendant, from which he was to take two successive crops, and to render the plaintiff a moiety of the crops in lieu of rent. While the crops of the second year were on the ground, an appraisement of them was taken by both parties, and the value ascertained. The defendant having afterwards refused to pay a moiety of the value, the action was brought. It was objected, on a case reserved, that the agreement was within the statute, because it related to land; but the Court over-ruled the objection, Eyre, C. J., observing, "that the circumstance of the appraisement seemed to put an end to this point. It was true, that as the case originally stood, the plaintiff had a claim to a moiety of the produce of the land under a special agreement; but that special agreement was executed by the appraisement. The circumstance of the appraisement afforded clear proof, that the plaintiff sold what the defendant had agreed was his; and the price having been ascertained, brought this to the case of an action for goods sold and delivered." In Crosby v. Wudsworth (c), Lord Elfenborough takes notice of Poulter v. Killingbeck, and observes that, "The contract, if it had originally concerned an interest in land, after the agreed substitution of pecuniary value for spe-(a) 2 Taunt, 38. (b)1 Bos. & Pul. 297. (c) 6 East, 602.

cific produce, no longer did so: it was originally an agreement to render what should have become a chattel, i. c. part of a severed crop in that shape, in lieu of rent; and by a subsequent agreement, it was changed to money, instead of remaining a specific render of produce, so that one wonders rather, how it should ever have been thought an interest in land, than that it should have been decided not to be so." So I say here, the contract was for the sale of a given quantity of potatoes, arising from a particular portion of land, to be delivered turned up by the seller, and taken away by the buyer. It was to be the specific sale and delivery of what was to be a complete chattel at the time of delivery, and being so, although some advantage may have been derived to the defendant, by the potatoes being allowed to remain in the land, still it was not an agreement for the sale of any lands,

tenements, or hereditaments, or any interest in or concerning them, within the meaning of the Statute of Frands.

LITTLEDALB, J.-.. I am of the same opinion. question arises upon the 4th section of the Statute of Frauds, which enacts, that no action shall be brought upon any contract or sale of lands, tenements, hereditaments, or any interest in or concerning them, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing. The question then is, whether the agreement for the sale of these potatoes is a contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them, and I am of opinion that it is not. I think that in all cases, if the subject-matter of the contract, which is the produce of land, is in a state of actual existence or complete production at the time of the contract, it is not a contract or sale of lands, tenements, or hereditaments, within the meaning of the section to which I have ad verted. I lay down this as the general principle; but in my opinion, though these potatoes may not have been

EVANS v. EVANS U. ROBERTS. fully grown at the time of the contract, and may, by being suffered to remain in the earth, have acquired additional nourishment or a further degree of value, yet I still think that it is not a contract or sale of any interest in land, within the meaning of the act of parliament. The words "lands, tenements, and hereditaments," in the 4th section, appear to me to have been used by the legislature as importing lands, tenements, and hereditaments, in fee simple. It is clear that they are used in this sense in the 5th section, which requires that a will of lands, tenements, and hereditaments, shall be attested by three witnesses. Then as to the words "or any interest in or concerning them," they must also be understood as referrable to a real and not a chattel in-It appears to me that the interest in or concerning lands, tenements, or hereditaments, must be such an interest as gives the party either the right to the reversion, or a right to the present possession. it is a contract for the sale of a term of years, or a contract by which at the time it is entered into, the vendee is to have a present possession, then it will be a contract or sale of an interest in lands, within the meaning of the statute; but otherwise it will not. Now here, the contract only gives the vendee an interest in the growing produce of the land, which constitutes its annual profit, and gives him no interest in that which can be said to be identified with the realty. This case seems to me to come within the doctrine of the law which is applicable to emblements. In Co. Litt. 55 b, it is said, "if tenant for life soweth the ground and dieth, his executors shall have the corn, for that his estate was uncertain and determined by the act of God." Then speaking of who shall have the right to emblements, he says, "if a man be seized of land in right of his wife, and soweth the ground, and he dieth, his executors shall have the corn; and if his wife die before him he shall have the corn." He then proceeds to point out an actual

distinction between emblements and the land itself; and he puts cases in illustration of what he lays down. is here speaking of an interest concerning land. when he comes to the growing produce of land, he points out a distinction between the land itself, and that which is produced by artificial culture. The latter he considers as a personal chattel, quite independent of, and distinct from, the land. It is true that the Statute of Frauds says nothing about the growing produce of land, but speaks of an interest in or concerning it; but if the growing produce of the land does not in any of . the cases put by my Lord Coke, constitute any part of the land, it appears to me that a sale of potatoes in actual existence at the time of the contract, whether they be in a state of maturity or not, is not to be considered a sale of an interest in or concerning land, within the meaning of the 4th section of the Statute of Frauds; and I think the cases which have been cited do not impugn this construction. But it may be said, that the object of the Statute of Frauds being to prevent the sale of a valuable interest in property from being contracted for by parol, there is no provision in the statute to guard against a case of this description. That, however, is not so; for this may be considered as a contract for the sale of goods, wares, and merchandize, within the meaning of the seventeenth section. It is clear, that if these potatoes are to be considered as goods and chattels, as I think they must, they might be taken in execution, under a writ of fieri facias. It is decided, that growing corn may be taken in execution, and I do not see why potatoes and turnips should not stand on the same footing. Those articles, it is true, are comparatively of modern culture in this country, and therefore it is not likely that they would be the subjects of legal decision, as to their liability to be taken in execution. Upon general principles of law, however, they would belong to the executors, upon the death of the owner of the fee, and would not go to the heir; and I take it to

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be a general rule, that whatever would go to the executor might be taken in execution. There are some things attached to houses, and which appear to form part of the realty, which may be taken in execution. In Wunne v. Ingleby (a), indeed, it was held, that the sheriff could not take in execution ranges, ovens, and set-pots, affixed to a house built by the person against whom the execution issued, because they would go to the heir; but in Poole's case (b), it was held, that vats, coppers, &c., set up in a house by a lessee for years, for the purpose of carrying on his trade, might be taken in execution under a writ of fieri facias, issued against him. I mention these cases to shew, that even things that appear to be fixtures to the freehold. may, in some cases, be seized as goods and chattels, and do not go to the heir. On these grounds, I am of opinion, that the contract of sale in this case was no more than the sale of a chattel interest; and that though the potatoes were not in a state of maturity at the time of the contract, yet they are to be considered as goods, wares, and merchandize, within the seventeenth section of the statute.

Rule discharged.

(a) Ante, vol. i., 247. 5 B. & Atk. 471; and Elwes v. Mawe, 3 A. 625. Vide Exparte Quincy, 1 East, 28.

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(b) 1 Salk. 368-

### BODDINGTON v. ABERNETHY.

Copyholder in fee surrendered to the uses of an antecedent deed of settlement. The deed of settle-

THE Master of the Rolls sent the following case for the opinion of this Court.

At the time of the making of the indenture of lease and release, next hereinafter mentioned; Anne Forbes,

ment reserved a power of revoking the uses therein declared, and of limiting new ones. The power was duly executed, and previously vested estates were thereby devested: Held, that the uses limited in the execution of the power were, nevertheless, valid.

spinster, party thereto, was seised for an estate of inheritance in fee simple, of certain freehold manors, messuages, lands, tenements, and hereditaments thereby conveyed. She was, also, at that time seised for an estate of inheritance in fee tail, at the will of the lord, and according to the custom of the manor of Enfield, of certain copyhold messuages and hereditaments, with the appurtenances, in the said indenture mentioned, situate within, and parcel of the manor of Enfield, and demised and demisable by copy of court-roll of the said manor, to any person or persons willing to take the same, in fee simple or otherwise, at the will of the lord, and according to the custom of the said manor. By lease and release, bearing date respectively the 27th and 28th June, 1785 (being the settlement made previous to the marriage of Anne Forbes with William Raymond), the release being duly made and . executed by and between Anne Forbes of the first part. William Raymond of the second part, James Raymond, the elder, of the third part, Thomas Fuller and James Raymond the younger, of the fourth part, John Raymond and Thomas Hall Fiske of the fifth part, and John Wolf and Thomas Hall of the sixth part, in consideration of the said then intended marriage, and other the considerations therein mentioned, the said freehold hereditaments of which Anne Forbes was seised in fee, were granted and released by her, with the privity and consent of William Raymond, and Thomas Fuller, and James Raymond the younger, their heirs and assigns, to the use of William Raymond for life, and to certain other uses therein specified. by the said indenture of release it was provided, agreed and declared, by and between all the said parties thereto. that it should be lawful for Thomas Fuller and James Raymond the younger, or the survivor of them, or the heirs of such survivor, at any time or times hereafter, at the request and with the consent and approbation of William Raymond and Anne Forbes, his intended wife, or of the survivor of them, during their lives, and the life of the

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survivor of them, (such request, consent, and approbation to be testified in manner therein specified), to dispose and convey, either by way of sale for valuable consideration in money, or in exchange for, or in lieu of other manors, &c., of equal value, all or any of the said manors, &c., unto any person or persons whomsoever, and that for the purpose of effecting such disposals and conveyances, but not for any other purpose, it should be lawful, if it should be thought necessary or requisite, for Thomas Fuller and James Raymond the younger, and the survivor of them, or for the heirs or assigns of such survivor, upon such request, and with such consent and approbation as aforesaid, testified as aforesaid, by any deed or instrument in writing, to be sealed and delivered by them, the said Thomas Fuller and James Raymond the younger, or the survivor of them, or the heirs or assigns of such survivor, in the presence of, and attested by, two or more credible witnesses, to revoke, determine, and make void all and every the uses, estates, trusts, powers, provisoes, limitations and agreements in the said indenture of release limited, declared and expressed, of and concerning the said hereditaments so to be sold or exchanged, and by the same, or any other deed or instrument in writing, to be sealed, and delivered, and attested, and with such consent and approbation, and so testified as aforesaid, to limit and appoint the said hereditaments and premises whereof the uses should be so revoked, either unto the purchaser or purchasers, or to the person or persons making such exchange or exchanges; and to his, her, and their respective heirs and assigns. or otherwise to limit, declare, direct, or appoint such new or other use or uses, estate or estates, trust or trusts, of and concerning the same hereditaments and premises, as should be necessary or requisite for effecting such sale or exchange. And after further reciting in the said indenture of release, that Anne Forbes was so seised in fee-tail, as aforesaid, of and in the copyhold messuages and hereditaments, with the appurtenances, within and parcel of

the manor of Enfield, as aforesaid, Anne Forbes covenanted to make such surrender, and suffer such recovery in the copyhold court of the said manor, as were necessary to extinguish her estate tail, and bar all remainders expectant thereon; and for surrendering, limiting, and assuring the same, according to the custom of the manor, to the same uses, and subject to the same powers, as were before limited and declared as to the freehold estates. Soon after the execution of the release, the intended marriage was solemnised; and afterwards Anne Raymond, and her husband, William Raymond, surrendered to the use of John Spelman Mannings, to make him a tenant of the said copyhold premises, in order that a recovery might be suffered according to the covenant. 17th March, 1789, Mannings was admitted, and a recovery was suffered according to the covenant, wherein one F. Ruddle was demandant, Mannings, tenant, and William Raymond, and Anne, his wife, vouchees, who further vouched the common vouchee. Ruddle was admitted, and immediately surrendered to the uses, and subject to the powers in the indenture of the release contained; and thereupon William Raymond was admitted tenant for life, according to that indenture. By release and appointment of the 16th July, 1805, made and executed by Thomas Fuller and James Raymond the younger, of the first part, William Raymond, and Anne, his wife, of the second part, Samuel Boddington (the plaintiff), of the third part, James Weston, of the fourth part, the Rev. John Raymond, of the fifth part, and Ambrose Weston, of the sixth part—Thomas Fuller, and James Raymond the younger, in consideration of 1,3201., being a reasonable price in that behalf, to them paid by Samuel Boddington, with the consent and approbation, and at the request of William Raymond, and Anne, his wife, testified as required by the said first mentioned indenture of release, and by virtue of the powers thereby given, sold the said copyhold premises to Samuel Boddington in fee. . And in pursuance

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of the powers to them given by the first mentioned indenture, and the surrender, revoked the uses, &c., to which the said copyhold premises had been surrendered, and did thereby limit and appoint, that all the said copyhold premises should, immediately from and after the sealing and delivery of the said indenture of release and appointment, be and remain to the use of Samuel Boddington, his heirs and assigns; and William Raymond, for himself, and Anne, his wife, did covenant with Samuel Boddington, that he would surrender, or cause to be surrendered, into the hands of the lord, to the use of him, Samuel Boddington, his heirs and assigns, the said copyhold premises. The said indenture of release and appointment of the 16th July, 1805, was a disposition, by way of sale, of the said copyhold hereditaments; and the same was duly signed, sealed, and delivered, by all the parties thereto, in the manner required by the first mentioned indenture of release and settlement. On the 22d August, 1805, William Raymond, according to the custom of the manor, surrendered the said copyhold premises into the hands of the lord, to the use of Thomas Fuller and James Raymond the younger, their heirs and assigns, upon the several trusts, and for the ends, intents, and purposes mentioned, expressed, and declared, of and concerning the same, in the said indenture of settlement of the 28th June, 1785; and at a court holden in and for the manor on the 28th August, 1805, Thomas Fuller, and James Raymond the younger, were duly admitted tenants to the same; habendum, unto Thomas Fuller and James Raymond the younger, their heirs and assigns, at the will of the lord, and according to the custom of the manor, upon the several trusts, and for the several ends, intents, and purposes mentioned, expressed, and declared, of and concerning the same, in the said indenture of settlement of the 28th June, 1785. Afterwards, at the same court, Thomas Fuller and James Raymond the younger, surrendered the same copyhold premises into the hands of the lord, to the

use and behalf of the plaintiff, Samuel Boddington, his heirs and assigns for ever; and thereupon the plaintiff, Samuel Boddington, was, at the same court, duly admitted tenant to the same copyhold premises, to hold the same, with the appurtenances, unto him, his heirs and assigns, for ever, at the will of the lord, and according to the custom of the manor. In July, 1822, the defendant, John Abernethy, entered into a contract with the plaintiff, to purchase of the plaintiff the said copyhold premises, whereof the plaintiff had been so admitted tenant as aforesaid, and a bill in the cause was filed to compel a specific performance of such contract. The question for the opinion of the Court is, whether the plaintiff has an estate in fee simple at the will of the lord, according to the custom of the manor, in the said copyhold messuages and hereditaments, with the appurtenances.

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Tinney for the plaintiff. The question in this case is, whether uses, which are to arise in futuro, dependent on contingencies, and which are to defeat previously vested estates, can lawfully be limited in a surrender of copyhold lands. It must be conceded that the Statute of Uses does not extend to copyhold lands; Rowden v. Malster, (a); where it is said," the Statute of 27 H. 8, c. 10, of Uses, toucheth not copyhold, because the transmutation of possession, the sole operation of the statute, without allowance of the lord, would tend to the lord's prejudice." It must be further conceded, that as a common law conveyance, the surrender in the present case would not be good; and the argument on the part of the defendant consequently must be, that a surrender of a copyhold is a common law conveyance, and must be governed by common law rules and principles. The reasons, however, upon which those rules and principles are founded, have by no means a general application to copyhold estates; 'therefore, the rules and principles themselves can hardly be held to apply to such 1826.
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estates. A freehold in future will not pass by the common law, because a freehold cannot be transferred without livery of seisin. A fee cannot be limited to a stranger in destruction of a previous fee, because by the common law, no estate of freehold can be defeated without entry by the feoffee, or his heirs, for a condition broken, and that entry would defeat the limitation over. But these cases do not apply to copyhold lands, because the freehold in them always remains in the lord. Many instances might be mentioned in which it has been held, that copyhold estates may be limited in modes, which the common law would not tolerate as to freeholds. A gift of freehold lands by husband to wife, or by wife to husband, would be bad; but the rule does not hold good with respect to copyhold lands: Brooks v. Brooks (a). In Coke's Copyholder (b), a series of cases of this sort may be found. That book establishes the position, that copyhold lands may be surrendered for estates of freehold to commence in future, and the old authorities upon the subject, fully support that position. Alice v. Nash (c), decided "that if a copyholder surrenders according to the custom, to the use of N. after the death of the surrenderor, that is good; notwithstanding that one cannot preserve the same estate to himself, for the estate is in the lord. And the surrenderor during his life shall take the profits, and afterwards, the lord ought to admit B. according to the direction of the surrender." Paulter v. Cornhill (d), among other points, "it was moved, whereas the surrender was to the use of one in fee, upon condition to pay 100%. to a stranger, and if he failed, that it should be to the use of a stranger in fee, whether that were a good limitation to the stranger; so as there should be a fee dependent upon a The Court spake not much hereto, but willed to have it specially found; yet Beamond conceived it to be good enough, for it shall be as an use limited upon a feoffment, and these uses shall rise out of the first surrender." (a) Cro. Jac. 434. (b) 81. (c) Noy, 152. (d) Cro. Eliz. 360.

So in Bentley v. Delamor (a), it is said, "it is good enough to limit a remainder upon a contingent fee in copyholds, as in case of mortgages of copyholds; a surrender in future is good, for the freehold remains in the lord." The only case which presents any doubt or difficulty upon this point is, that of Simpson v. Sotherne (b). That case is to be found in all the numerous contemporary reporters of the time, who vary considerably in their accounts of it; but the fullest, and it may be said the best report of it, is that given by Bulstrode, which is as " R. Simpson being a copyholder of inheritance in fee simple, did surrender these his copyhold lands (jacens in extremis), unto the lord of the manor; habendum, after his death, ad opus et usum of the infant then being in ventre sa mere, and that if such infant dies without heir, within age, or before marriage, then he surrenders these lands to the use of one J. Simpson and his heirs, according to the custom of the manor. R. Simpson, the copyholder, dies; afterwards Joan, the infant with which his wife was with child, was born, the which Joan died within age; the question now was, whether J. Simpson should have his copyhold estate, according to the second surrender, or E. Spinke, who was found to be heir to R. Simpson, the copyholder, who made the surrender, and also to Joan, the infant who was dead." The decision was, that J. Simpson should not have the estate; but that was on the ground that a grant to an infant in ventre sa mere was not good by an immediate surrender; therefore, the case as reported by Bulstrode does not support the doctrine that a surrender to take effect in future cannot be good. Croke, in his report of the case, says, "secondly, they resolved that this surrender to the use of J. Simpson and his heirs, if it happens that his child in ventre sa mere die within age, is merely void; for he cannot make such a conditional surrender to operate in future." Bulstrode, however, gives no such resolution; and

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<sup>(</sup>a) Freeman, 267. 376. 1 Roll. Rep. 109, 137, 153.

<sup>(</sup>b) 2 Bulstr. 272. Cro. Jac. Godbolt, 264. 2 Roll. Abr. 791.

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though it appears from his report, as well as from that of Rolle, that Coke, C. J., in the course of the discussion, intimated an opinion of the same kind, and referred to Clampe's case (a), as an authority in point; that latter case upon examination appears to be no authority for such an opinion, and is, indeed, a very different case. Margaret Boreman, who was copyholder in fee, married J. Clampe; they afterwards surrendered the land, per nomen of the reversion, after the death of them both, to the use of the plaintiff and his heirs; Margaret Clampe died, and afterwards her husband; and the plaintiff entered; the defendant was customary heir of Margaret Clampe. The Court gave judgment for the defendant, and rightly, for there it was clear that the surrender was void, for it was a surrender of a reversion which was not in the surrenderors. In Godbolt's report of Simpson v. Sotherne, the ground of the decision is represented as being that the remainder to J. Simpson was dependent upon a condition precedent, which was never performed. In Coke's Copyholder, Supplement, 144, the same case is quoted as a decision that a surrender must be to a person, or to the use of a person, who is in esse, and who is capable of such a surrender, or of taking presently by force of such a surrender; and there, consequently, a surrender to the use of an infant in ventre sa mere was held to be void. And that was probably the true ground of the decision, for in Bulstrode's report of the case, Coke, C. J., assimilates it to a devise to an infant in ventre sa mere, which he says cannot be good. In Coke's Copyholder, 81, it is said, "in customary grants upon surrenders, the law is not so strict as in grants at the common law; for in grants at the common law, if the grantee be not in rerum natura, and able to take by virtue of the grant, presently upon the grant made, it is merely void; but in customary grants upon surrenders, the law is otherwise." Now that is opposed to the decision in the case of Simpson v. Sotherne,

and Lord Coke adds, that a surrender to him that shall be heir of J. S., or to J. S.'s next child, is good. The decision in Simpson v. Sotherne as reported by Croke, is certainly quoted with approbation in Gilbert's Tenures, 259; but it is questioned in Fearne's Contingent Remainders, 6th ed., 276, where Paulter v. Cornhill, and Stocker v. Edwards (a), are cited as in point. The last mentioned case is thus stated:-- "A surrender of a copyhold tenement was made to the use of himself for life, and after to the use of J., his youngest son, and the heirs of his body, if he attain to the age of eighteen years; and if he die before he attain to that age, without issue male, then to his right heirs." The question there was, whether this was a contingent remainder, or whether it would operate immediately upon the death of a tenant for life; and the Court held that it would operate immediately. The same case is reported by Levinz (b), who assumes it to have arisen out of a devise of copyholds, but a note to the case of Bromfield v. Crowder (c), shews that assumption to be erroneous; and neither of those reporters go so far as to intimate that any doubt was expressed that such a conditional surrender, to take effect if the son died before he attained the age of eighteen years, would be good. It will be urged on the other side that surrenders of copyholds are, in effect, common law conveyances, and must be so construed; and cases will be cited which seem at first sight to support that position. For instance, in Lovell v. Lovell (d), Lord Hardwicke said, "Surrenders of copyhold estates are to be construed as deeds and conveyances at common law, and not as a will." But even if they are to be construed as common law conveyances, it by no means follows that they must operate as such; and the concluding words, " and not as a will," clearly shew that Lord Hardwicke was referring merely to the construction of the words

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<sup>(</sup>a) 2 Show. 398. .

<sup>(</sup>c) 1 N. R. 324.

<sup>(</sup>b) 3 Lev. 132.

<sup>(</sup>d) 3 Atk. 11.

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of the surrender, which the very next sentence confirms; for he adds, "and, as Mr. Ford said, a springing use in a copyhold estate would be construed as a springing use in In Fisher v. Wigg (a), Lord Holt said, a freehold." " copyhold lands do not differ in construction of law from freehold lands, and surrenders of copyholds must be governed by the same rules as conveyances at common law;" but that is open to the same observation as the dictum of Lord Hardwicke, and the other Judges entertained a different opinion: and it is admitted in Watkins on Copyholds (b), that if that is law, surrenders of copyholds ought not to be construed as conveyances at common law. If an estate, to commence in futuro, may be limited on a surrender of copyhold, why may not a power be reserved of revoking the uses declared in the surrender, and limiting others in their stead? Lord Hardwicke seems clearly to have been of opinion, in the case of Lovell v. Lovell, that a springing use might be limited in a surrender of copyhold, and there are cases in which, though this point was not discussed, it seems to have been assumed that a surrender of copyhold to particular uses, with a power to the surrenderor of revoking those uses, and declaring others, by deed or by will, would be good; Roe v. Griffith (c), Doe v. Morgan (d), Lord Kensington v. Mansell (e). There is a current of authorities tending to shew, that in a surrender to the use of his will, a devisor may limit springing uses, the effect of which will be to defeat previously vested estates; Welleoke v. Hammond, cited in Boraston's case (f), Brian and Cawsen's case (g), Taylor v. Taylor (h), Driver v. Thompson (i), Doe v. Barthrop (k), Holder v. Preston (l); and as a will does not operate as a devise of copyholds, but merely

(a) 1 P. Wms. 14. 1 Ld. Ray. 622.

(b) I. 112.

(c) 4 Burr. 1953.

(d) 7 T. R. 103.

(e) 13 Ves. 240.

(f) 3 Rep. 20.

(g) 3 Leon. 115.

(h) 1 Atk. 386.

(i) 4 Taunt. 294.

(k) 5 Taunt. 382.

(l) 2 Wils. 400.

as a declaration of the uses of the surrender, it seems inconsistent with sound reasoning to contend, that uses declared in that mode may be supported, but not in any other. Before the Statute of Uses, although a freehold could not be given to commence in futuro, springing uses might be declared upon a feofiment of a freehold to uses, because in that case the freehold always remained in the same person; and the same rule ought to apply to the case of a copyhold, because there, the freehold always remains in the lord. In point of practice, copyhold estates were, during a long course of years, made the subjects of settlements similar to the present. Precedents of such cases are yet extant in the books (a), and their validity was never seriously questioned until modern times (b). It is highly desirable that such settlements should be held valid by the courts of common law, because, otherwise, they must be made by way of trust, and the parties must be driven into a court of Equity to compel the performance of the trusts. The manor rolls are evidence of the copyholder's title, but no steward of a manor will enter trusts upon the rolls; and the trusts may be defeated by the trustees committing a forfeiture, or the estate of the trustees may escheat by accident; and in either of those cases great injustice would be worked, for then the lord would hold by a title paramount to the trusts, instead of one subject to them.

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G. R. Cross, contrà. The plaintiff has no estate in fee simple in the copyhold premises in question. It must be admitted, that the power reserved in this settlement, of revoking the old, and declaring new uses, has been well executed; the question is, whether such a power is good? That such a power would be bad, in a common law conveyance of a freehold, there is no doubt; and it is equally

<sup>(</sup>a) English Copyholder, 385. (b) Gilb. Ten. 259. Watk. Copy. Horseman's Precedents. II. 468. c. 5. III. 425.

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clear, that surrenders of copyholds ought to be treated as common law conveyances. Such a power is repugnant to the principles of law, applicable to copyholds, for it would defeat previously-vested estates; and, according to the general rule of law, no vested estate of copyhold can be devested, except by surrender. It has been argued, that the rules of common law do not apply to copyholds, because the freehold remaining in the lord, supports all the uses and trusts declared of the land, and the lord stands in a parallel situation with the feoffee to uses of freeholds. But the argument is not maintainable, for there is this clear distinction between the cases: previous to the Statute of Uses, the legal estate was in the feoffee; but in the case of copyholds, it is in the copyholder, and not in the lord: and as the estate of the copyholder is sufficient to support the trusts, and as springing uses may be limited by way of trust, no inconvenience can result from holding such a power as this to be void. In their descent, copyholds follow the rules of common law; Coke's Copyholder (a); Smith v. Triggs (b); and if there is a devise to the customary heir, he is nevertheless in by descent, and not by the will; Doe v. Wroot (c). In Doe v. Barthrop (d), there was a devise of copyhold to two, and their heirs, in trust to permit M. A. S. to enjoy the same, or to pay to, or to permit and suffer her to receive the rents. during her life, for her separate use; and subject to such estate of M. A. S., to such persons, &c., as M. A. S. should by her will appoint; and, in default of appointment, to the right heirs of M. A. S. It was held that the appointee, by will, of M. A. S. took a legal estate, although the trustees had never surrendered to the use of the will of M. A. S., nor had M. A. S. been admitted tenant; and the Court said, "it was a general rule, that the legal estate in the trustees should be carried only so far as was necessary to effectuate the several intentions of the will;

<sup>(</sup>a) 116.

<sup>(</sup>b) 1 Str. 487.

<sup>(</sup>c) 5 East, 132.

<sup>(</sup>d) 5 Taunt. 382.

that in that case, the trust was sufficiently executed, by limiting to the trustees a base fee, determinable with the life of M. A. S., and that the legal estate, therefore, went over from them when that estate determined." The result of all these cases is, that the copyholder remained always with the legal estate, with all its incidents attached to it, and had not a mere fiduciary estate; all those incidents were at common law, and were enforcible in the common law courts: and there are numerous authorities for saying that a conveyance by surrender and admittance is a common law conveyance, and is to be governed by the rules of common law. Lord Holt was of that opinion in Fisher v. Wigg (a), and though two learned Judges, Gould, J., and Turton, J., dissented from him on that occasion, he was supported in expressing a similar opinion in the case of Idle v. Cook (b), a very few years afterwards, by a majority of the Court. In that latter case, the Court held that a surrender was to be treated as a common law conveyance; and Powis, J., speaking of a surrender, and considering what language was sufficient to create an estate tail, said, "in a conveyance at common law, as this is, the donor must by express words give direction from whose body the heirs inheritable are to issue." ton v. Sutton (c), the rule is there laid down:—"In the cases of surrenders of copyhold estates, the same construction must take place, as in all other conveyances at law; and so held in Idle v. Cook, by the whole Court, that a limitation of uses in a copyhold surrender, must be construed by the same rules as if it were a limitation in any other conveyance at common law;" and the rule is laid down to the same effect, by Lord Hardwicke, in Lovell v. Lovell; and by Lord Kenyon, in Wright v. Kemp (d). In Gilbert's Tenures (e), it is said, "as well estates as, descents of copyholds, are to be guided according to the

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<sup>(</sup>a) 1 P. Wms. 14.

<sup>(</sup>d) 3 T. R. 470.

<sup>(</sup>b) 1 P. Wms. 70.

<sup>(</sup>e) 258.

<sup>(</sup>c) 2 Atk. 101.

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rules of common law, as a necessary consequence upon the customary estates;" and there are many cases which exemplify that position, and in which it has been decided, that customary estates of freeholds cannot be given to commence in futuro. In Dunnal v. Giles (a), it was said, "If I surrender to the use of B. after my decease, it is not good." In Leonard's Report of Clamp's case (b), it is said, "a copyholder in possession surrendered the reversion of his land, post mortum suam, to the lord, to an use; and it was adjudged that thereby nothing passed." In Seagood v. Hone (c), " the case was, John Reve, copyholder in fee, surrendered into the hands of two; this surrender not to stand and be in full force until after the death of John Reve. John Reve died, and the surrender was presented at the next Court, and Francis Reve and John Reve were admitted. And it was resolved that the surrender was good, and that clause, being repugnant to the premises, shall be rejected as void and idle, and shall not destroy the premises." The plain inference from that case is, that the clause in question, if not "void and idle" itself, would have made the surrender void. leading case upon this point is that of Simpson v. Sotherne, which seems decisive in favour of the defendant, for the decisions there, as given by Coke in his report of the case (d), are these:--" First, that this surrender, habendum, after death, to the use of another, and his heirs, is merely void: for a copyholder in fee cannot surrender, habendum, after his death, no more than a tenant in fee can convey his lands, habendum, after his death, for then he should leave a particular estate in himself which is against the rules of law; and there is not any difference betwixt a copyhold and a freehold as to that purpose. Secondly, that this surrender to the use of J. S. and his heirs. if it happens that his child in ventre sa mere die within

<sup>(</sup>a) 1 Brownl. 41.

<sup>(</sup>c) Cro. Car. 366.

<sup>(</sup>b) 4 Leon. 1.

<sup>(</sup>d) Cro. Jac. 376.

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age, is merely void; for he cannot make such a conditional surrender to operate in future." Bulstrode's report of the case is certainly somewhat different, but still it furnishes no authority in favour of the plaintiff. There Coke, C. J., says, "this case may, peradventure, somewhat vary from Clamp's case; there he surrendered, after his death, to the lord, to uses; but here he surrenders to the lord, habendum, after his death, to the use, &c.;" but Haughton, J., says, "a surrender of a copyhold estate to the use of another, this is a conveyance, and a man cannot make a conveyance to begin upon a contingency; no case there is of this:" and Coke, J., says, "By devise such an estate might be made. but not so as here it is, in point of a surrender, which cannot be good." The decision in Clamp's case is recognised also in Barker v. Taylor (a); and a similar decision will be found in Bambridge v. Whitton (b). Allen v. Nash, which has been cited on the part of the plaintiff from Noy, is very differently stated by Brownlow (c). There the surrender is described as being to the second son for life, after the death of the tenant and his heirs, and is said to have been held a bad surrender; and in the Lex Custumaria (d), the case, as represented by Noy, is said to be a wrong decision. In Roe v. Griffiths, and the other cases of that class, no decision was ever arrived at upon the point, nor, indeed, was the point ever discussed; therefore, they cannot be considered as having any weight, or as being any authorities on the subject. even assuming that a surrender to operate in futuro may be good, still it by no means follows that the execution of a power to revoke the uses of a surrender, and to declare others in their stead, shall defeat a previously vested estate in copyhold lands. An eminent modern writer has expressed an opinion, that a vested estate cannot be devested by such means (e); and cites as his authority Coke's

(a) Godb. 451.

<sup>(</sup>b) March, 176.

<sup>(</sup>c) I. 127.

<sup>(</sup>e) Gilbert on Uses, by Sugden,

<sup>353,</sup> note.

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Copyholder (a), where it is said, "a copyhold interest cannot be transferred by any other assurance than by copy of court rolls, according to the custom." It is true, it is said in Coke's Copyholder (b), as cited on the other side, that, "in customary grants upon surrenders, the law is not so strict as in grants at the common law;" but Lord Coke adds, "the reason of the law is this,-a surrender is a thing executory, which is executed by the subsequent admittance, and nothing at all is invested in the grantee before the lord hath admitted him according to the surrender; and, therefore, if at the time of the admittance, the grantee be in rerum naturâ, and able to take, that will serve:" that passage, therefore, taken altogether, does not at all warrant the position that the execution of a power such as this can defeat a vested estate of copyhold. all events, even if the Court should think that a surrender to uses to operate in future may be good, still they cannot give judgment in favour of the present plaintiff, unless they are further of opinion, that the deed originally declaring the uses of the surrender, may also reserve a power to revoke vested estates, and to limit new ones.

The following certificate was sent:—"This case has been argued before us by counsel. We have considered it, and are of opinion that the plaintiff has an estate in fee simple, at the will of the lord, according to the custom of the said manor, in the said copyhold messuages and hereditaments, with the appurtenances.

С. Аввотт.

J. BAILEY.

G. S. HOLROYD (c)."

<sup>(</sup>a) S. 36, p. 83.

<sup>(</sup>b) 81.

<sup>(</sup>c) Littledale, J., was not present at the argument.

# J. SAUNDERSON, ANNE, his Wife, and LYDIA WHITE, Spinster, v. GRIFFITHS.

ASSUMPSIT upon a special agreement, alleged to have Where baron been made between the plaintiffs and the defendant re- clared with A. spectively, whereby the plaintiffs agreed to demise and let jointly upon unto the defendant certain lands and premises, therein to demise particularly described. After setting out the agreement, upon certain the declaration averred, that defendant became and was considerations tenant to the said plaintiffs (naming, them) of the premises moving, and in question, on the terms mentioned in the said agreement, averring the and was, thereupon, put into possession thereof; and that the three, and in consideration of the premises, and that said plaintiffs had then and there undertaken and promised to said the agreement defendant to do and perform all things in the said agreement by them in that behalf to be done and performed, agent, for and he, defendant, undertook and faithfully promised said the wife, and plaintiffs, that he, during the continuance of his tenancy, A. only: would perform the terms and conditions thereinbefore par- variance. ticularly mentioned. Assignment of breaches, in not repairing during the term, under-letting without license, and received rent for not using the farm-lands in a husbandlike manner. nant, subse-Second count nearly the same as the first. count stated, that in consideration that defendant had agreement. become and was tenant to said plaintiffs, of certain other farm-lands and premises, being the freehold of plaintiffs; tion averring Anne Saunderson and Lydia White, defendant, undertook fendant was and promised to use and cultivate the lands in a hus- tenant to the Breach, that defendant did not use and had bandlike manner. and cultivate the lands in a husbandlike manner. Plea, agreed to farm the lands the general issue, and issue thereon. At the trial before in a husbandthe Justices, at the Court of Great Sessions, at the last Lent assizes for the county of Glamorgan, the plaintiffs ing that the produced in evidence an agreement for a lease, made and

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and feme dean agreement thereunto promises to it appeared in evidence that was entered into by an on behalf of though the husband had from the te-The third quent to the date of the Count in the same declarathat the delike manner, and it appeardemise was only by two, and that the

agreement was also, to keep the land constantly in grass: - Held, fatal variances.

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executed on the 1st of February, 1822, between Alexander Murray, agent for and on behalf of Miss White, of Park Street, London; and Mrs. Saunderson, of Brighton, in the county of Sussex, of the one part, and the defendant of the other part; whereby the said A. Murray, for and on behalf of Miss White and Mrs. Saunderson, agreed to let unto the defendant all that part of the grass lands south of Miskin House, formerly occupied by Lewis Williams, containing about 57 acres; and the defendant agreed to take the same lands for a term of one year from that date. to continue in force from year to year, and to farm the lands in a good and husbandlike manner, to keep them constantly in grass, and to bestow thereon yearly all the muck and manure made upon the same lands. The agreement further witnessed that the defendant agreed also to take the grass lands, occupied by Thomas Williams, of Miskin House, from the 2nd of August then next ensuing, at the yearly rent of 571., and pay for the land south of Miskin House, the yearly rent of 35l. The defendant thereby further agreed not to let or underlet either of the said parcels of land, without the consent of his landladies, and to keep the gates and fences in repair. On the part of the landladies, it was stipulated that they should put the fences and premises into tenantable repair as soon as conveniently might be, to allow rough timber for the defendant's repair, to be marked and pointed out by the steward; and, lastly, it was witnessed by the parties thereto, that they should enter into and execute a lease of the before mentioned premises. The agreement was signed by Murray the agent, and the defendant respectively. was proved by Mr. Murray, that he had demanded and received rent of the defendant for Mr. and Mrs. Saunderson, and that he had paid over the same in moieties, one to Mrs. Saunderson, by the direction of her husband, and the other to Miss White, the latter and Mrs. Saunderson being sisters. On the part of the defendant, it was objected, that there was a misdescription in the declaration

of the agreement declared upon in the first count. In that count the agreement was averred to have been made by three plaintiffs, whereas the instrument produced in evidence, purported to have been made on behalf of Mrs. Saunderson and Miss White only. The second count, it was contended, was also disproved in evidence, for the consideration there stated for the defendant's promise was, that he had become tenant to all the three plaintiffs, the fact being that he was tenant only to two. To this it was answered, that the rent having been paid by the defendant to Saunderson the husband, and the latter having received it without objection, he must be considered in law as a party to the contract, and bound by his acknowledgment of the defendant as tenant. The learned Judges, however, were of opinion, that the fact of the husband's receiving rent could not by relation make him a party to a contract by which he was not bound ab initio, and, therefore, they directed the plaintiffs to be nonsuited. A rule nisi having been obtained in Easter term, for setting aside the nonsuit, cause was now shewn by-

Malkin and Whitcombe. Neither of the counts upon which the plaintiffs rely, is supported by the evidence. The first count avers, that the agreement was made between all the three plaintiffs and the defendant. Now that is not true in fact, nor is it the legal effect of the instrument, assuming that Mr. Saunderson had an interest in the subject-matter of the agreement. It may be true, that the husband is entitled to the wife's portion of the rent; but that will not make him liable to perform the stipulations and conditions of an agreement, to which he is not, in fact, a contracting party. The consideration for the promises stated in the declaration, fails in proof, when it is shewn that the consideration was moving only from two, and not from three plaintiffs. Payment of rent to Mr. Saunderson, will not by relation make him a party to the contract, if he was not originally bound to perform the

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stipulations in the agreement. It is perfectly clear, that if the defendant had had to complain of a breach of the agreement on the part of the plaintiffs, he could not have made Mr. Saunderson liable upon it as a party, because there is no mutuality; and the payment of rent to him cannot give any legal effect to the agreement beyond its terms. There is, therefore, a manifest variance between the agreement as set out in the first count of the declaration, and that proved in evidence. Then as to the third count, that fails in proof in two particulars. First, it is averred, that the defendant was tenant to the three plaintiffs, whereas, in fact, he was only tenant to two. it is there only said, that the defendant undertook and promised to use the lands "in a husbandlike manner," Now, according to the agreement produced in evidence, besides using the lands in a husbandlike manner, he was to keep the same "constantly in grass," which is a stipulation ultra the using in a husbandlike manner. This also is a fatal variance, and is not consistent with the legal description of the instrument in the declaration. For this, Carter v. Gray (a), and Latham v. Rutley (b), are authorities.

Maule, contrà. The allegations in the declaration may be satisfied by the evidence given at the trial. There is nothing inconsistent in the averment, that according to the legal effect of the instrument, the three plaintiffs had agreed to let the premises in question to the defendant. It is not necessary to shew that Mr. Saunderson, the husband, was originally a party to the agreement; it is sufficient, if he has adopted and acted upon it. Now he has adopted and acted upon it by receiving rent from the defendant, and he is therefore bound by relation back, to abide and perform the conditions of the agreement. It may be true, that the husband is not in fact a party to this written instrument; but still the legal effect of it is

<sup>(</sup>a) 6 East, 364.

<sup>(</sup>b) Ante, vol. iii. 211.

correctly stated in the declaration. There is no doubt that Mr. Saunderson, in right of his wife, has an interest. What interest? That of a landlord. The defendant, as tenant, has enjoyed the land under the agreement, and he has paid rent to the husband, who thereby acknowledged that the defendant was tenant. Who then is to bring an action against the tenant for a breach of any of the conditions of the agreement? Why, the parties who are interested. If a landlord assents to an agreement made and entered into by his wife, it is submitted, that it is the same thing as if he was originally a party, although the assent may be given a year afterwards. The only question in this case is, whether there is a legal and binding agreement between the parties before the commencement of this suit? If there was, then it would be no answer to say, that there was a time when the agreement was incomplete and inoperative. It cannot be denied, that if an action is at all to be maintained on this agreement, the husband must be a party to the record, for he has a clear interest in the subject-matter of the instrument. Here, then, the agreement is stated according to its legal effect, which is all that is necessary. In Ankerstein v. Clarke (a), it was held, that if a bond be given to husband and wife, administratrix, the husband alone may declare on it as a bond made to himself. The husband in the present case having received rent, must be taken to have ratified the authority of Murray, to make the agreement in his behalf, and if so, then the maxim of law, "omnis rati-habitio retro-trahitur et mandato œquipara-Then as to the supposed tur," comes into operation. variance between the averment in the third count, and the agreement, which stipulates that the farm is to be used in a husbandlike manner, that does not all affect the plaintiff's right to recover. That latter stipulation necessarily imports, that this being a grass-farm, shall be cultivated in a husbandlike manner, which, when referrable to the

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(a) 4 T. R. 616.

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subject-matter, implies that it shall be kept in grass, which if it were not so, the agreement would be broken, for it could not then be said that the defendant had cultivated the lands according to the course of good husbandry.

BAYLEY, J.—It seems to me that the nonsuit in this case was rightly directed. Attending to the form of the first count in the declaration, and the nature of the consideration therein stated for the promise made by the defendant, I am of opinion, that in order to support that count, there ought to have been proof of an agreement to which the husband was a party ab initio; and that proof of a subsequent ratification by him, of an agreement to which he was originally no party, is not sufficient. being an agreement for an interest in land, it was necessary that it should be in writing, pursuant to the provisions of the 4th section of the Statute of Frauds; but without adverting to that point, it is sufficient to say, that the contract being in writing, no parol evidence was admissible to vary or explain its import. The agreement purports to have been made by Murray, as the agent of Mrs. Saunderson and Miss White, only. The husband does not appear to have had any authority himself to enter into the agreement, or to authorise any body to execute it on his behalf. He was a mere stranger to the instrument, and all that is proved is, that he knew of its execution. But then it is said, that his subsequent ratification of it is sufficient in law to make him a party, and we have the maxim, "omnis rati-habitio retro-trahitur et mandato œquiparatur," pressed upon us; but I think, that if the instrument was ab initio inoperative, for his not joining as a party thereto, his subsequent assent is not equivalent to a previous command. The declaration states, that the defendant became, and was tenant to all the plaintiffs of the premises, upon the terms mentioned in the agreement, and was put into possession; and in

consideration of the premises, and that the plaintiffs had then and there undertaken, and promised the defendant to do and perform all things in the agreement by them to be done and performed, he, the defendant, undertook and faithfully promised the said plaintiffs, that he, during the continuance of his tenancy, would perform the terms and conditions thereinbefore particularly mentioned. declaration therefore states, as it ought to have done, all the consideration moving each party. It is clear, that at the time the contract was made, it was intended that each party should have a right of action against the other, for the breach of any of the stipulations entered into by them respectively. In order, therefore, to maintain such an action, the consideration moving each party must be strictly proved. Now, suppose that the tenant, within six months after his tenancy commenced, and before any rent was paid, had brought an action against Mr. and Mrs. Saunderson and Miss White, for the non-performance of any of the stipulations on their part, contained in the agreement, he must have been nonsuited, because he would not have been able to shew that Mr. Saunderson ever became a party to the agreement, or was bound by any of its stipulations during the period to which the action must refer. The averments, therefore, in the first count of the declaration, are not made out, because there is a failure of proof, that the three plaintiffs had undertaken to perform the conditions contained in the agreement, on their part to be performed. Then, as to the third count, it avers a general contract on the part of the defendant, to use the farm in a husbandlike manner. The contract proved, was to farm that part of the land, consisting of 57 acres, formerly occupied by a person named -Williams, in a husbandlike manner, to be kept constantly in grass. There is, therefore, a variance between the contract declared upon, and that proved in evidence. true, that you may sometimes borrow some of the terms in a written contract, to support a count upon a general con-

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tract; but in this instance, that cannot be done, for here, the contract given in evidence contains an express stipulation, that the land is to be kept in grass, which is something beyond the ordinary understanding of good husbandry. The general course of good husbandry may be to plough and crop the land in a particular manner; but here there is a qualification of the previous stipulation, which is no-where to be found in this count, and, therefore, I am opinion that it cannot be supported. However, as a little alteration might have made this count good, we see no objection to the plaintiffs being at liberty to amend the declaration upon payment of costs, as between attorney and client, if they shall be so advised; but otherwise a nonsuit is to be entered.

HOLROYD, J.—I am also of opinion that the plaintiffs are not entitled to recover upon any of the counts contained in the declaration. It is quite clear, that the consideration stated in the first count, for the defendant's promise, was not proved, inasmuch as the agreement given in evidence was not a joint agreement by the three plaintiffs, but by Mrs. Saunderson and Miss White, only, for whom alone Murray, the agent, was authorised to act. It appeared in evidence, that Murray did not stipulate that Mr. Saunderson, the husband, should demise; he only assumes to have authority from Mrs. Saunderson and Miss White; and therefore, in point of law, it was not the agreement of the husband. But then it is said, that the subsequent assent of the husband will ratify it as to him. and make him a party ab initio. This, however, is not so. If, indeed, the agent had assumed the power of including the husband as a party, the subsequent assent of the latter might have had relation back to the time when the agreement was first entered into, and so bind him; but here the husband never previously authorised the agent to make the agreement on his behalf, nor is he named as a party for whom the agent professed to act.

section of the Statute of Frauds, it is enacted, that "no action shall be brought upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised." Now it is clear that there is no note in writing, within the meaning of this section, which shews this to be the husband's contract. It is true, that the husband, by receiving rent, would be bound to admit that the defendant was tenant; but that would not make him a joint contractor ab initio, and bind him to the performance of the special stipulations of an agreement to which he was not a party. It appears to me, therefore, that the first count has completely failed in proof. As to the third count, I own it does appear to me, that that also has not been established in evidence, inasmuch as the stipulation "to keep in grass," which is contained in the agreement proved, is a qualification of the general averment in that count, that the defendant was to farm according to good husbandry.

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LITTLEDALE, J., concurred.

Rule discharged.

## CHANNON v. PATCH.

At the trial before Littledale, J., at the Devonshire summer assizes, 1825, the plaintiff had a term, cuts verdict for nominal damages, subject to the opinion of this down trees Court upon the following case.

If a lessor, during the growing upon the demised premises,

which are fit only for firewood, and the lessee takes them away, trespass will not lie against the lessee, at the suit either of the lessor, or his vendee.

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The declaration charged the taking and carrying away divers pollard oak trees and other trees, and divers loads of timber. Pleas, first, the general issue; second, that defendant was lessee for years, determinable on lives, of certain lands, being part of a tenement called Buckwaters, under a lease of 1st January, 1765, from J. Buller; and that there was an exception of all timber trees, or young saplings likely to become trees, with free liberty of ingress for the lessor to fell, root up, and carry away the same. The plea then, after stating defendant's possession and the continuance of the term, concluded thus:-- "And because the said pollard oak trees and other trees in the said declaration mentioned, at the said time, when, &c., were found and being in and upon the said demised premises, and whereon the same had theretofore respectively stood growing, and being in a dry, rotten, hollow state, and only fit for fuel, and the same not being at the time of making the said first mentioned indenture, to wit, on 1st January, 1765, nor at any time thereafter, or during the continuance of the said term, or at the said time when, &c., any manner of timber trees, or young saplings, likely to become trees, standing, growing, and being in and upon the said demised premises, defendant, at the said time when, &c., seized, took and carried away the said pollard oak trees and other trees in the said declaration mentioned, as and for firebote, the same then and there being reasonable estovers for the use, profit, and enjoyment by defendant of the said demised premises, with the appurtenances, as he lawfully might, &c." The plaintiff joined issue upon the first plea, and replied generally de injuriâ suâ to the second, upon which issue was joined. It appeared in evidence that S. W. Buller, esq. was now by descent seised of the reversion of the demised premises, and that early in 1824, he had caused all the timber and pollard trees, sound and unsound, on the estate, to be marked; and that in May, 1825, he had caused, among others, two pollard oak trees, the trees in question, to be

felled, which grew in the hedge of a field, parcel of the demised premises. The bark was ripped on the day on which the trees were felled, was piled up to dry on the ground where the trees were cut, and, after remaining there a week, was carried home to Mr. Buller's. trees remained where they were felled, till early in November following. About the end of the previous October they were bought of Mr. Buller, with another tree felled in an adjoining field, for 14s. 6d., and paid for, by the plaintiff; and afterwards, in November, they were removed by the defendant, subsequently to a notice forbidding him to do so, off the demised premises, and carried to an orchard, parcel of another tenement called Pithayes, which was then occupied by the defendant under a lease of the same date with that of Buckwaters, granted by the same lessor, and to which also Mr. Buller was in like manner entitled in reversion. There was no house on Buckwaters' farm, but there was one on Pithayes', used for all the purposes wanted in respect of the occupation of Buckwaters, and in which the defendant resided. The demised premises were 46 acres in the whole, partly arable, and partly pasture. After the felling of the two pollard trees in May, there were in the whole upon the demised premises, 142 oak pollards, and 17 ash pollards, including sound and rotten. The two pollard trees for which the action was brought, were found by the jury to have been pollards, and decayed, and only fit for firewood at the time when, &c., and also at the date of the lease, and to have been unfit for any ordinary building uses. Supposing there had been a farm house on the premises, corresponding with the extent of Buckwaters' farm, the stock of wood upon it properly applicable to firebote, was about sufficient for two years' consumption.

Coleridge, for the plaintiff. The plaintiff purchased the trees of the reversioner of the estate on which they

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grew, and was therefore entitled to them, and may maintain this action for them. The reversioner had marked, felled, barked, and sold the trees, so that the property was clearly in him, unless the tenant had that absolute and exclusive right to all trees on the estate fit for firebote, which rendered the acts of his landlord not only actionable, but absolutely void, so as Now it is clear, that at vest no possession in him. common law, a tenant for years has not an exclusive right to all the wood fit for firewood; he is entitled to it only for the purpose of consuming it on the premises, and to so much of it only as is reasonably sufficient for that pur-Co. Litt. 53 b; 2 Bl. Comm. 35. If he could take more than he requires for his own consumption, there would be nothing to prevent him from selling firewood, which it has been held illegal for a tenant to do. Lord Courtown v. Ward (a). The tenant's right to estovers is governed by the same principles of law as the right of common of estovers; and yet, if a party has common of estovers in the woods of another, and the owner of the woods cuts down the wood, the commoner may not take any part of that which is so cut down, but must resort to his action: Bassett v. Maynard (b), Mary's case (c). Douglas v. Kendal (d): and where the common of estovers is appurtenant to a house, the estovers must be consumed in the house, and not elsewhere: Valentine v. Penny (e). Assuming this analogy between the commoner's right to estovers, and the tenant's, to be correct, and that in the latter case the landlord has the general right in himself, or at least has a concurrent right with the tenant, two consequences follow: first, that the landlord may cut the wood, leaving sufficient for the use of the tenant, and subject to the tenant's right of action for the trespass, if the landlord enter illegally; and second, that even if the

<sup>(</sup>a) 1 Scho. & Lef. 8.

<sup>(</sup>c) 9 Rep. 112 b.

<sup>(</sup>b) Cro. Eliz. 820. F. N. B. 58, ... (d) Cro. Jac. 256.

<sup>159.</sup> 

<sup>(</sup>e) Noy, 145.

landlord cuts without leaving sufficient for the use of the tenant, the property in the wood, nevertheless, vests in the first-instance in the landlord, or his vendee, and the only remedy for the tenant is by action. Here there is no proof that there were not sufficient pollards left for the use of the tenant, and upon that point the onus probandi lay upon the defendant; but even if, in fact, there were not sufficient left, still, when the trees were once severed, the defendant had no right to take them, for they became, by the mere act of severance, the property of the reversioner, and the defendant's only remedy was an action on the The trees, however unsound and useless, were nevertheless parcel of the inheritance, and did not, at all events, pass to the tenant; because all trees, whether timber or not, are prima facie parcel of the inheritance, and belong to the landlord. Where they are demised with the land, the tenant may acquire such an interest in them as may make it illegal for the landlord to cut them down; but still, when they are cut down, they become the property of the landlord, and the tenant has no remedy but his action for the tort.

Jeremy, contrà, having cited Herlakenden's case (a), where it was, among other things, resolved, "that if trees, being timber, are blown down by the wind, the lessor shall have them, for they were parcel of his inheritance, and not the tenant for life, or tenant for years; but if they be dotards, without any timber in them, the tenant for life, or tenant for years, shall have them;" was stopped by the Court.

BAYLEY, J.—That case is decisive of the present, and upon that authority it is clear that this action is not maintainable. If the lessor would have had no right to these trees if they had been severed from the inheritance by the act of God, it would be monstrous to hold that he

(a) 4 Rep. 62.

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Holroyd, J.—I am clearly of the same opinion. If the trees had been blown down, they would have become the property of the tenant; the Countess of Cumberland's case (a); and the landlord, or his vendee, cannot by wrongfully cutting them down, acquire a right to them, or entitle himself to maintain an action against the tenant for taking them away. If he could, he would be in a situation to take advantage of his own wrong, because the tenant, being entitled to the usufruct of the trees during the continuance of his term, had a remedy by an action on the case against the landlord, for wrongfully cutting them down.

LITTLEDALE, J.—I am entirely of the same opinion. It is laid down in Com. Dig., Biens. H. Trees., "that if trees are thrown down by tempest, the lessee, without impeachment of waste, may take them; for the entire property is in him, when the trees are severed from the inheritance by the act of the party, or of the law."

Judgment for the defendant.

(a) Moore, 812.

### BULLEN v. DENNING.

TRESPASS, for cutting down, carrying away, and con- An exception verting plaintiff's apple trees. Plea, not guilty, and issue in a lease or lands in Dorthereon. At the trial, before Burrough, J., at the last setshire, of Dorsetshire Lent assizes, the case was this.—Earl Poulett, trees and by lease of 24th December, 1778, demised to one Perkins other trees, certain premises, parcel of the manor of Marshwood, in the annual fruit county of Dorset, and then in the possession of Perkins, thereof," does not include or his assigns, "except and always reserved, out of the apple trees. said demise, unto the said earl, his heirs and assigns, all royalties, franchises, mines and quarries, and the produce thereof. And also all timber trees and other trees, but not the annual fruit thereof, and all saplings and standils likely to become trees, then or thereafter growing, or being in or upon the said demised premises, with free liberty of ingress, egress, and regress, for the said earl, his heirs and assigns, into, upon, and from the said demised premises. to search for, fell, cut down, work up, dig, take, and carry away the same, and to plant any new tree or trees in the banks of the hedges of the said demised premises;" to hold to Perkins, his executors, administrators, and assigns, from and after the death of Perkins, for the term of 99 years, if three persons therein named should so long live, at a yearly rent therein mentioned: proviso, that if Perkins, his executors, &c., should, during the term, commit, or suffer to be committed, on any part of the demised premises, any waste or damage to the value of 10s., or should cut down or fell any maiden or sound pollard tree, or top, poll, or injure any maiden tree then, or thereafter, growing or standing on the said demised premises, without the permission of the earl, his heirs or assigns, first had and obtained, the lease should be void. The interest of Earl Poulett in the demised premises had vested in the plaintiff. The defendant was the tenant of the demised premises to the devisee of Perkins. In the year 1824, and during the

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lifetime of two of the cestui que vies mentioned in the lease, the defendant cut down three apple trees which had been planted by a former tenant, after the lease had been granted; and for this trespass the action was brought. It was contended, on the part of the defendant, that apple trees were not included in the exception in the lease, and, consequently, that the plaintiff, as reversioner, could not maintain trespass; and Wyndham v. Way (a) was relied on as in point. The learned Judge declined to nonsuit, but reserved the point, and the plaintiff had a verdict, with leave for the defendant to move to enter a nonsuit. In Easter term last, a rule nisi having been obtained accordingly,

Tindal and R. Bayly now shewed cause. The question in this case is, whether the words of the exception in the lease," all timber trees and other trees," are sufficiently large to comprehend apple trees; and it is confidently submitted, on the part of the plaintiff, that they are. The words in the exception, in Wyndham v. Way, were, "all trees, wood, coppice wood, &c.;" all of them expressions clearly denoting that by "trees," such trees only were meant as were useful for timber; therefore that case has no bearing upon the present. In this case the lessor has in effect demised the fruit of the trees only, and not the bodies, as he might well do, for such a demise has been held good; Grantham v. Hawley (b). But, even if the words "all timber trees and other trees" are not large enough to comprehend fruit trees, still, the words which follow, namely, " not the annual fruit thereof," clearly demonstrate an intention to except the bodies of fruit trees; because those words must be understood as applying to the annual produce of such trees alone, and not to the trees themselves. It may be urged that some kinds of timber trees bear fruit, and that the word fruit, in its legal sense, is occasionally applied to the produce of timber trees

<sup>(</sup>a) 4 Taunt. 316.

<sup>(</sup>b) Hob. 132.

as well as to the produce of those trees which are termed. in the popular sense of the word, fruit trees; and, consequently, that the words "not the annual fruit thereof" in the exception, may have been designed to exclude from the exception the acorns of the oak, the masts of the elm and the beach, and the produce of other timber trees, and not merely apples and the produce of other fruit trees. But in construing the demise, the nature and situation of the demised premises must be considered, and the word "fruit" must be taken in that sense in which the contracting parties probably used it at the time when the lease was made. Now, the demised premises are situated in a county where cider is a staple commodity, and where apples form one of the most important and valuable portions of the produce of the land. It was, therefore, highly important to the lessee that he should be entitled to take the apples, but it was utterly unimportant to him whether he was entitled to take the produce of other trees or not; so that it seems impossible to doubt that, in using the word "fruit," the parties intended to denote the produce of those trees which are, in common parlance, called fruit trees, and no other.

Erskine, Coleridge, and Bere, contrà. The apple trees are not within the meaning of the exception, and it will be most for the interest, both of the landlord and tenant, so to determine; for then the landlord may maintain an action of waste against the tenant for any injury done to the trees, and may compel him to keep the orchards regularly and sufficiently stocked. The only advantage that can redound to the landlord, by holding that the apple trees are excepted, will be that he may prevent their being cut down, and that when they die, or are blown down, the branches and bodies of them will belong to him. Now, the tenant would be extremely unlikely to cut down an apple tree while it continued in bearing, because that would be contrary to his own interest; and as to the

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branches and bodies of such trees when they had ceased to bear, their value to the landlord would be quite insignificant. But the tenant would be under a great disadvantage, because if he cannot cut down an apple tree, neither can he have the right even to lop and prune it, to the extent necessary for its proper cultivation and thriving. [Holroyd, J. The tenant's right to the fruit will give him, necessarily and incidentally, a right to lop and prune the tree, so as to make it produce a crop]. At all events, he will more clearly possess that right if the apples trees are not excepted, and such a general power over the trees would tend to the improvement of the orchards, and to the advantage of both parties. Again, if the apple trees are excepted, the trees belong to the landlord, and then, what will be the situation of the tenant? He will be entirely at the mercy of the landlord, whether he shall have any orchard at all; for the landlord may enter upon the premises to cut down the trees, but can neither enter to plant new trees himself nor compel the tenant to plant them. The mere grant of the fruit will not protect the tenant in the case of the apple trees any more than in the case of oaks, elms, beech, walnut, or chesnut trees, for the fruit of all those trees must be included in that grant; and yet such a grant would not prevent the landlord from cutting down any sort of tree he pleased, because it is a grant of the fruit only of such trees as he thinks proper to leave standing, for so long as he may chuse to leave them standing. In Tregmiell and Wife v. Reeve (a), there was a grant of the land, "excepting the timber, saving that his wife should have and take the shrouds and loppings of them;" and it was held, that the owner of the fee could not cut down any of the trees. But here the exception is of the trees generally, without saving out of it any part of The exception here, of " all timber trees and other trees," would of itself, according to the legal construction of the words, clearly not include apple trees, for apple trees, and the other species of fruit trees, commonly so

called, do not pass under the general term trees; Wyndham v. Way (a), Waller v. Travers (b), London v. the Chapter of the Collegiate Church of Southwell (c), Lord Zouch v. Moore (d); so that, but for the saving words, " not the annual fruit thereof," the apple trees would certainly not be excepted. Now a saving out of an exception. can operate only so as to leave excluded that which would otherwise have been included in the exception; it cannot operate to extend the exception: Leigh v. Shaw (e). There, one let a rectory for years, excepting the mansionhouse of the rectory, saving to the lessee one chamber. The question was, whether that chamber passed by the lease. The Court said, "here is an exception out of an exception, which is good enough, and shall make it pass by force of the lease; for this exception or saving makes the thing excepted as if it had never been let: so a saving out of a saving makes it as if it never had been excepted, and then it passed by force of the lease at first." It is a general rule, that an exception is to be construed strictly, and most favourably, for the lessee; Earl of Cardigan v. Armitage (f); and, therefore, if the exception would not of itself have included the apple trees, à fortiori, the saving, which is not to extend the exception in favour of the lessor, but to narrow and restrain it in favour of the lessee, cannot include them, because that would be to construe the exception to the prejudice of the lessee. A very sufficient meaning may be given to the word "fruit," in the saving here, without holding it to apply to the produce of the apple trees, for fruit is a term well known in the law as designating the annual produce of timber and other trees, in distinction from fruit trees, popularly so called. Dyer, 36 a, 90 a, 332 a; Liford's case (g); Co. Litt. 53 a; Berry v. Heard (h); and Com. Dig., Biens. H. Trees.

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(a) 4 Taunt. 316.

(f) Ante, vol. iii., 414. 2 B. &

(b) Hardr. 309.

C. 197.

(c) Hob. 303.

(g) 11 Rep. 48.

(d) 2 Roll. Rep. 274, 355, 358.

(h) Cro. Car. 242.

(e) Cro. Eliz. 372.

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BAYLEY, J.—I incline to think that apple trees are not within this exception. The general rule of construction is clear, that where any reasonable doubt exists upon the meaning of an exception in a lease, the words of the exception, being the words of the lessor, are to be construed favourably for the lessee, and against the lessor. Earl of Cardigan v. Armitage (a), and the authorities there cited. The question here, therefore, is, whether, looking at the subject-matter of the demise, and the lease altogether, it is clear that fruit trees were intended to be excepted, or whether there exists any reasonable doubt of such an intention. Now, under a grant of "timber trees and other trees," fruit trees would not pass; and if they would not pass under such words in a grant, neither would they be included under such words in an exception; for "it is a rule, that what will pass by words in a grant, will be excepted by the same words in an exception," The Earl of Cardigan v. Armitage; and the rule must apply equally in the negative as in the affirmative. Here, the words of the exception are, "all timber trees and other trees, but not the annual fruit thereof," and the question is, what is the meaning of the latter words, "but not the annual fruit thereof." That some meaning must be given to them is plain, because if the annual fruit saved was the fruit of orchard trees, it follows as a matter of necessity, that the bodies of those trees are within the exception. The word "fruit," in its legal acceptation, is not confined to the produce of such trees as are popularly called fruit trees, but applies equally to the produce of the oak, the elm, the beech, the walnut tree, the chesnut tree, and perhaps some others. In all the early writers, the lessee is said to have an interest in the trees, in respect of the shade for cattle, and the fruit thereof, so that the words, "the annual fruit thereof," may be satisfied by applying them to the produce of timber trees; and it does not appear clearly from the words of the exception, that fruit trees were intended to

<sup>(</sup>a) Ante, vol. iii., 414. 2 B. & C. 197.

be included in it; and then, unless there are other parts of the lease, from the language of which that intention can be decisively inferred, the rule of construction to which I have alluded applies, and we are bound to hold that the fruit trees are not excepted out of the demise. Now, looking at the nature of the land demised, and its situation in a county where cider is made, and where apples constitute the leading article of annual produce, it does not appear probable, that a lessor would make apple trees expressly the subject of exception; because, as the lessee was at all events to be entitled to have the trees standing, and to use the fruit produced by them, during his term, the exception would confer upon the lessor nothing more than a right to the branches or bodies of the trees, as they should happen to be broken off or blown down, which would be certainly of little, if of any, value to him. There is a proviso, that if the tenant tops, or polls any maiden tree, the lease shall be void. Now a newly planted apple tree is a maiden tree; and yet if such trees are included in the exception, the tenant has not the power to top, or poll them, without which it is impossible that they should ever bear fruit. The lessor is to have liberty to cut down standing trees, and to plant new trees in the banks of the hedges, which cannot be understood as intended to include fruit trees, because in that case, the liberty certainly would not have been limited to the banks of the hedges. There is one clause in the lease, which, during the argument, excited considerable doubt in my mind, namely, that by which the lessee covenants, in the place of every timber or other tree, thrown down or decaved during the term, to plant or set another fresh grown young tree of the same kind. As there is no other express stipulation on the part of the lessee to plant trees, I for some time entertained a doubt, whether that covenant did not include apple trees; but upon further consideration, I am satisfied that no such inference necessarily arises;

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apple trees from time to time, and to keep the orchards well-stocked, without any express covenant to that effect, that the landlord might naturally deem it unnecessary to insert any such covenant in the lease. Then as it does not appear that the word "trees," in other parts of the lease, was intended to include apple trees; and as the lessee's continuing to have a right to the apple trees, is as much the lessor's advantage as his own, for he is not at liberty to destroy the apple trees, and he will for his own sake, from time to time, renew them, I think there is no language in any other part of the lease, from which I can clearly infer an intention to include the apple trees in the exception: and as the exception itself will not of necessity include them, I think the words of the saving part do not clearly express such an intention, but leave the matter doubtful; and then the whole exception must be construed against the lessor, and in favour of the lessee, upon which construction we are bound to hold that the exception does not include the apple trees. The result of that is, that the action is not maintainable, and that the rule for entering a nonsuit must be made absolute.

Holroyd, J.—This is a question arising upon a regular lease by indenture, containing all the formal parts of such an instrument. It must be construed, therefore, according to the rules of law governing the construction of such instruments, and in the sense which decided cases have appropriated to the words it contains. If a different or unusual meaning was intended, that should have been expressed in plain and unequivocal language. The lease contains a demise of lands, with an exception of "all timber trees, and other trees; but not the annual fruit therefof." Now it is a general rule of construction, that where there is a grant, and an exception out of it, the words of the exception are to be taken as the words of the grantor, and to be construed in favour of the grantee. It is also clear, upon several authorities, that the words "other

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trees," coupled with timber trees, will not include fruit trees; and for this plain and sound reason, that their chief value consists in the fruit, and not in the timber, in which respect they differ essentially from other trees. Then, as fruit trees are not included in the words of this exception, and as the words of the exception are to be taken as the words of the lessor, and to be construed in favour of the lessee, the question is, what is the meaning and operation of the saving words, "but not the annual fruit thereof?" That they were intended to operate in favour of the lessee, is beyond the possibility of doubt; but if we construe them, as we are desired to do, so as to extend the effect of the exception, they will operate decidedly to his prejudice. We cannot so construe them, nor can we infer that the parties intended them so to be construed, if we can give them any other legal effect, not inconsistent with the interpretation given by decided cases to the preceding words, "all timber trees, and other trees." Now, the word "fruit," in the old law writers, is frequently used with reference to the produce of timber trees, as well as of orchard trees; and if we construe it as used in that sense here, we shall adhere to the proper rule of construction, and prevent the saving clause from extending the effect of the exception, and operating to the prejudice of the lessee. I am of opinion that it ought to be so construed; and then it follows, that the apple trees are not within the exception.

LITTLEDALE, J., concurred.

Rule absolute.

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of a light house was assessed in a poor rate for " the light house, with the duties or contribution monies in respect of ships, hoys, and barks, passing by the same." He occupied the light house, andmaintained a light there, by means of a servant, within the parish; but the duties were paid, and the light used, by the ships, out of the parish:-Held, that the duties formed no part of the value of the light house, and were not rateable.

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By letters patent granted in the 13th year of the reign of George the Second, that king granted to Thomas Lord Lovell, his executors, &c., all that the light house at or near Dungeness, in the county of Kent, and free leave, license, power, and authority, to maintain, continue, and renew the same with lights, to be continually burning therein in the night season, from time to time; and, if need were, to alter, remove, and change the same, and to rebuild another at any place near the same, by the advice or direction of the masters, wardens, and assistants of the Trinity House, of Deptford Strond, for the time being; and such light house, so rebuilt, to maintain, continue, and renew with lights, to be continually burning therein in the night season, in such manner as might be for the safety and direction of the traders that way; and for defraying the necessary charges in maintaining, continuing, altering, renewing, removing, and changing or rebuilding the same, the king did thereby grant,' that during the term of years thereinafter granted, the said Thomas Lord Lovell, his executors, &c., should and might collect and receive to his and their own proper use, towards the charges aforesaid, one penny by the ton from all merchants, masters, or owners of all ships, hoys, and barks, passing by the said light house cutward bound, and the same inward bound; and the same for strangers, as often as they should pass by the light house, for 60 years from the 24th of June, 1768, subject to the yearly rent of 61. 13s. 4d., payable to the crown half yearly. The letters patent then provided for the collection of the tolls, and that no other person should erect any light house within five miles of Dungeness. All the estate and interest under the said letters patent are, and have for many years past been, vested in the appellant, Mr. Coke. The light house and lights are kept up at his expense, and a person employed and paid by him resides in the light house for the purpose of attending, and attends the lights. The duties, or contribution monies, are collected at the various ports of arrival and departure of ships passing the light house, by persons employed and paid by Mr. Coke. There is not any port, or custom house within the town, liberty, or parish of Lydd, nor have any duties or contribution monies ever been collected within the said town, liberty, or parish, nor do any of the ships, in respect of which the duties or contribution monies are paid, come within the said town, liberty, or parish, but the same pass up and down the channel in front of the said parish and light house, in the open sea, at different distances from the shore, along which the said parish extends eight miles and upwards; the light house standing on the sea shore, above high water mark, and within the said parish. The annual value of the light house, independently of the duties or contribution monies, would be 41. Mr. Coke does not reside or inhabit within the town, liberty, or parish of Lydd, nor occupy or possess any property within the said town, liberty, or parish, in any manner whatever, except as aforesaid. Personal property, stock in trade, or the profits of manufactories, never have been rated in the parish of Lydd, nor are assessed by the rate in question, up to the time of making which the light house had been rated as a cottage only, at the sum of 40s., and the 'duties or contribution monies had never been rated or taken into account in making the rate. The rate in question was made on the 2d April, 1825, and Mr. Coke is rated therein as "the occupier of the light house, with the duties or contribution monies in respect of ships, hoys, and barks passing by the same," the annual value of the same being stated to be 2,2501. The duties

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or contribution monies yearly collected for Mr. Coke under the above mentioned letters patent, amount to the sum assessed in the rate, over and above the expense of keeping up the light house and lights.

Boteler, Darby, and Burton, in support of the order of sessions. The appellant is properly rated upon the full amount of the annual profits of the light house. Undoubtedly, those profits arise principally out of tolls, which are not rateable per se; "but tolls, when connected and rated conjunctively with real and substantial property, situated in the parish, as yielding profit there by means of tolls, are a proper object of rating." That was laid down by Lord Ellenborough in Rex v. M'Donald (a), and applies to the rate in question, because the tolls, which from the increased profit and value of the light house here, come precisely within the description there given of rateable tolls. Rex v. Rebowe (b), and Rex v. Tynemouth (c), are very different cases, for there the tolls themselves were rated; and in the latter of those cases, Lord Ellenborough seems to have been of opinion that the rate might have been supported in some other mode: for instance, if made upon the increased rent received for the light house by means of the light, which was the meritorious cause of earning the tolls. And that opinion is consistent with the general principle by which rates upon property of this sort are governed, namely that the amount of rate in every parish must be proportionate to the meritorious cause of earning profit situated within the parish. Thus, in rating canals, it is now settled that the amount of rate in every parish through which a canal passes, must be proportionate to the amount of tolls earned by the canal in every parish respectively; Rex v. The Oxford Canal Company (d). Here the amount of the tolls earned (a) 12 East, 324. (d) Ante, vol. vi., 86. 4 B. & C.

<sup>(</sup>b) Bott. 142. 1 Const. 115. 74. See Rex v. Trent and Mer-Cowp. 583. sey, Ante, vol. vi. 47.

<sup>(</sup>c) 12 East, 46.

is ascertained in one entire sum; therefore, the sole question is, whether any, or what proportion, of those tolls is earned within the parish of Lydd. In this case, indeed, the vessels which pay for the benefit of the light, do not actually come into the parish in which the light, the meritorious cause of earning the tolls, is situated; but that seems immaterial; because, as the light house yields an annual profit in that parish, that annual profit is equally rateable, whether it arises from the actual produce of the land, or from some chattels annexed, or some privilege attached to the land; in the same way as if land is rateable in respect of a profit arising from actual produce, it is equally rateable in respect of a profit arising from a chattel annexed, or a privilege attached to it. Thus in Rex v. The New River Company (a), it was held that land, of which the annual value was improved by a spring, might be rated at such improved value, although the owners and occupiers of the land did not receive the profits derived from the spring, and no part of the profits became due in the parish where the land lay; for, said Lord Ellenborough, "it is enough to ascertain the local value of the property, without inquiring whether it yields a return on the spot. The session has come to a right decision, inasmuch as the property is locally valuable in the parish where it is rated, although that value be derived from extrinsic circumstances, and although the profits are actually received elsewhere." So here, the light-house is rateable for all its profits, inasmuch as it is locally valuable in the parish of Lydd, and earns the tolls there, although the ships by which those tolls are paid do not themselves come into the parish. As the water was considered as actual produce in the case just cited, so the light must be considered as actual produce here; and then it is immaterial whether the light, by its own intrinsic properties, conveys itself to the ships, or whether it is conveyed to them by extrinsic means. In one respect this is a stronger case

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than that of the New River Company, for there the water could be of no value in any parish but that in which the rate was made, until it was detached and separated from the spring, which was the local visible property: but here, the light for the use of which the vessels pay, not only continues attached to the light house, which is the local visible property at the time when it is of value to the vessels, but could not possibly be of any value unless it did continue so attached. There are other cases in which the question, whether the fact of the value arising out of extrinsic circumstances was or was not material, might have been discussed, and doubtless would have been, had the point been deemed arguable: Rex v. The Lord Mayor of London (a), and Rex v. The Birmingham Gas-Light Company (b); for in the former of those it did not appear that the vessels which paid the tolls ever went into the parish in respect of which the rate was imposed; nor in the latter, that the gas was consumed within the parish. [Holroyd, J. The benefit here is not conferred within the parish]. The light, which confers the benefit, is situated within the parish, and the very circumstance of its conferring a benefit constitutes its value to the occupier. it is not necessary that the benefit should be conferred within the parish. In Rex v. The New River Company, the charter expressly provided that no benefit should accrue to the company until they had conveyed the water to the metropolis; and yet the land in Amwell, where the spring arose, was held to be rateable to the amount of the profits arising from that benefit. Here the light is in the parish of Lydd, and annexed to the freehold there; the tolls could not be separated from the light house in a grant of the latter; the light is part and parcel of the light house. The light house is valuable in respect of the tolls, on account of the exclusive privilege of maintaining the light house, and the light in the parish of Lydd; and if the grantee were to pull down the light (a) 4 T. R. 21. (b) Ante, vol. ii., 735. 1 B. & C. 506. Rex v. the Brighton Gas Company, Ante 308.

house, and rebuild it, he could not rebuild it in any other parish. The light being in the parish, the vessels have the benefit of the light there situated; and the stream of light by which that benefit is conveyed to them, may be compared to the stream of water, in the case of the New River. So long as the light continues in the light house it renders it more valuable, as a billiard table, or any other chattel, annexed to a dwelling house, would render that more valuable. [Bayley, J. I cannot consider the light as being part and parcel of the light house; it is not necessary that the light should be attached to the light house: it might be equally well maintained by lamps placed on the top of a pole, or by many other modes that might be suggested]. The terms of the patent, which are "to build and renew the light house with lights," seem clearly to contemplate the lights being attached to the freehold; but that is an immaterial point, for the great argument is, that the privilege of maintaining the light, or rather the profit arising therefrom, is rateable, whether the light is attached to the freehold, or not. In Rex v. Bradford (a), the privilege of selling liquors in a particular house, a canteen, in a particular situation, was considered as a profit appurtenant to the house, arising from its local situation; and so here, the privilege of maintaining the light in the light house, being in itself profitable, must be considered as appurtenant to the light house, and forming part of its value.

Nolan and Tindal, contrà. It is admitted that tolls are not rateable per se, and there is no such connection between the tolls in this case, and the light house, as will render them both liable to a joint rate. Where the proprietor of tolls resides out of the parish in respect of which he is rated, the tolls, in order to be rateable, must be annexed to some substantial property situate within that parish, or must arise as the profits of land occupied

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by him there. The tolls in question satisfy neither of those descriptions. In the first place, neither the privilege of maintaining the light, or the tolls payable in respect of it, are annexed to any house or land within the parish of Lydd. The terms of the grant do not connect the light and the light house; the object of the grant may be effected without any such connection existing: the light may be maintained without being attached to any land or building, by being placed in a moveable frame, and by many other expedients. The privilege is exercised within the parish of Lydd, but it is neither connected with, or appurtenant to, any house or land there. Suppose the privilege granted to the defendant had been that of firing a gun, or ringing a bell, with a toll payable by every vessel passing within reach of the sound; would he have been liable to be rated for the tolls to the parish of Lydd, because he placed his gun in a bastion, or his bell in a belfry, and exercised his privilege in a building erected within that parish? Certainly not. In the second place, the tolls do not arise as the profits of any land, used or occupied by the defendant within the parish of Lydd. The tolls are not paid in respect of any use made of the light house in the parish, but, on the contrary, in respect of an use made of the light out of the parish. This is the distinguishing point between this particular case, and all those in which tolls have been held rateable, as connected with the land; and upon this short and simple ground it is perfectly clear that these tolls are not rateable.

BAYLEY, J.—I am of opinion that this rate can be supported to the extent of the value of the light house only. The defendant is assessed for the light house, with the duties or contribution monies in respect of ships, hoys, and barks, passing by the same, at the annual value of 2,250l. Now, in order to make him rateable to that extent, it must be shewn that he is the occupier of a house or land of that annual value, within the meaning of the statute 43 Eliz.

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All the cases cited in argument are distinguishable from the present, except two, Rex v. Rebowe (a) and Rex v. Tynemouth (b), and they are authorities in favour of the defendant, because in both it was expressly decided that the tolls of a light house are not rateable. There was a considerable interval of time between those two decisions; and where there has been one settled mode of proceeding, with respect to a particular species of property for a long period of years, we ought not to introduce any alteration, unless we see such alteration called for upon clear grounds, and founded upon sound legal principles. I believe the privilege of erecting light houses to have originally vested in the Crown, and to have been subsequently granted to the Corporation of the Trinity House. The tolls are paid by the proprietors of vessels, and if those tolls are fairly proportioned, they will furnish an adequate fund, both for the remuneration of the proprietor for the expense of keeping up the light house, and for a reasonable profit for the trouble of maintaining a constant light. But if the proprietor of the light house is to be held rateable, as such, to the relief of the poor, he must of necessity exact larger tolls from the proprietors of vessels, and the consequence will be, that they will in reality be the persons to pay the rate, and a considerable burden will be imposed upon commerce. In Rex v. Macdonald (c), the rate was upon the lock, and the defendant was held liable to the rate as the occupier of land in the parish; and properly so, because the lock itself was part and parcel of the land he occupied, and the tolls were payable for the use of the lock. In Rex v. The Oxford Canal Company (d), the defendants were rated as the occupiers of the towing-path land, and that part of the canal which was situate within the parish of Sow. There, the rate was specifically upon land; the proprietors of the canal were, in the proper sense of the word, occupiers of

<sup>(</sup>a) Bott. 142; 1 Const. 115; (c) 12 East, 324. Cowp. 583. (d) Ante, yol., vi. 86; 4 B. & C.

<sup>(</sup>b) 12 East, 46.

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the land; they were liable to the rate as such occupiers, and in that character only; and our decision was merely this, that they ought to contribute to the parish in respect of the beneficial use of the land which they occupied within it. In both these cases there was a local, visible, substantial ownership and use of land within the parish. Rex v. Bradford (a), is very different from the present There the defendant was rated as the occupier of a canteen in Hythe barracks, demised to him by the commissioners for the affairs of barracks, to hold for one year, provided the barracks should be so long held, and used as barracks, by government. He was to pay 151. a year rent, for the canteen and buildings, and 510l. a year rent for the privilege of using them as a canteen, and selling liquors there; and the lessors reserved a power of distress for the amount of both those sums. The defendant was held rateable for the entire rent of 5251., for the house, and the privilege, upon the ground that such rent was a profit appurtenant to the tenement, arising out of its peculiar local situation, and that he was the occupier of a tenement of that value. The decision in Rex v. The New River Company (b), is perfectly satisfactory; the rate there was clearly good. There, water which arose, and was the produce of land, in the parish of Amwell, was conveyed to London by the defendants, and there sold. The price, therefore, at which the water sold in London, was a profit yielded by the land at Amwell, where the water rose; for the water was part of the produce of the land, and though it was sold, and the value received at another place, it was nevertheless part of the profits of the land, and rated as such at Amwell, precisely as land producing fruits or vegetables is rateable, not where its produce is sold, but where it is grown; although the occupier is under an engagement not to sell the produce in his own parish, but at some distant place. present case stands upon a totally different footing. Here,

<sup>(</sup>a) 4 M. & S. 317.

<sup>(</sup>b) 1 M. & S. 503.

the proprietor of the light house has the privilege of maintaining, either in that house, or in any other which he may chuse either to erect or to rent, a light such as shall be visible at sea; and even if by the terms of his patent he were bound to maintain the light in this particular building, still, if the patent were not granted to him on account of his occupation of that building, the privilege conferred by it would not be annexed, or appurtenant to the building in which it was exercised, but perfectly distinct from it: and the tolls received by him in respect of the light, would be profits accruing, not from the use or occupation of the house or land where he exercised the privilege; but from the exercise of the privilege itself, independently. In that case, he would have the exclusive privilege of carrying on in that particular house, if I may be allowed the expression, a particular kind of trade; but still there would not necessarily be any connection between his freehold interest in the house, and the light which he thus maintained in it. The machinery by which the light is produced, or in which it is contained, may, or may not be attached to the freehold, and would in either case equally answer the purpose for which it is If the light were produced by burning coal. or any other fuel, with a reflector placed behind it, the tolls paid by the proprietors of vessels for the benefit derived from the light, would not form part of the profits of the house in which the fuel was burned, and the reflector placed; but part of the profits of the privilege itself. If, then, the object of the grant may be effectuated by machinery producing a light perfectly unconnected with the light-house, in which case the tolls would not be part of the profits of the land, and would not be rateable, I think it follows, that the privilege of maintaining the light, even in a particular house, is distinct from the house, and that the tolls are profits arising, not from the house where the privilege is exercised, but from the exercise of the privilege, and as such not rateable as part of

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the value of the house: and if the tolls, quà tolls, are not rateable, then, though the trade, for I consider it as a species of trade, must be carried on in a house, or even in this particular house, a distinction ought to be taken between the value of the house in which the trade is carried on, and the profits accruing from the trade itself. The nature of the trade is, that the proprietor of the lighthouse is to maintain certain lights burning in it; those lights are not necessarily attached to the freehold; and if they are not attached to the freehold, they are personal property. As a remuneration for the trouble and expense of maintaining those lights, the tolls are imposed; such tolls have never yet been rated: and I am of opinion that they are not rateable. For these reasons I think so much of this rate as is assessed upon the tolls ought to be quashed.

HOLROYD, J.—I am also of opinion that these tolls are not rateable; and that we could not hold them to be rateable without overruling the cases of Rex v. Rebowe and Rex v. Tynemouth, and overturning the principles upon which those cases were decided, as well as some other cases, where it has been held that tolls, though not rateable per se, are rateable where they can be considered as money paid for the use and occupation of land. Rebowe was very similar to the present case. There, the king, by his letters patent, granted to the defendant the privilege of erecting light houses at Harwich, and of receiving tolls from all vessels entering or passing by the harbour, which tolls were to be applied towards the maintenance of the light houses. That was the case, therefore, of a franchise granted by the crown; for the privilege granted was a franchise, though differing from many that are so denominated. The power of erecting light houses belonged originally to the Lord High Admiral, though it has since been vested in the Trinity House. For what are the tolls in this case payable? Certainly not for any

benefit received within the parish, because they are payable every time a ship passes by the light house, whether she receives any benefit from the lights or not; whether she passes in the day time when the lights are extinguished; or whether she passes in the night time when the lights are burning. In Rex v. Rebowe, where such tolls were rated, Lord Mansfield said, "they have, properly speaking, rated the fire, and the profits arising from the house; the Pantheon play house, and other places of public amusement, are rated, I suppose, but not for their profits." The whole Court, after taking time to consider of that case, were of opinion that the tolls were not rateable. One reason that Lord Mansfield gave for his opinion, was, "that the property was not in the parish," by which expression he clearly did not allude to the light house, but to the tolls, which were not paid in respect of any benefit received in the parish by the persons paying them. Another reason which he assigned was, "that the tolls were not locally situate in the parish, and were not rateable there;" whereas, if the tolls could have been considered as parcel of the value of the light house, for which it might have been rated, they might themselves have been rated as tolls. Some years after that decision came the case of Rex v. Tynemouth, where also the defendant was rated for tolls in respect of his light house. Lord Ellenborough, after observing upon the similarity of the two cases, said, "what local property is there within the township on which this rate on the tolls can be levied? The tolls are not received there, nor do the ships from which they are collected come within the township; the subject-matter of the rate has no locality within the township." Now the light house was within the township, therefore, Lord Ellenborough clearly spoke of the tolls, and not of the light house, as the subject-matter of the rate. Upon the authority of these two cases, I think we are bound to say that the tolls in this case, having no locality within the parish of Lydd, and not being received

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there, are not rateable. In Rex v. Cardington (a), the rate was upon certain tolls for passing a sluice. There the thing for the use of which the tolls were paid, was within the parish, and was used by the party paying the tolls within the parish; and it was held, that whether the profits of the sluice were, or were not, rated under the denomination of tolls, the nature of the property rated ought to be considered; and as the tolls were paid for the use of something situate within the parish, and conferring a benefit there, the rate was good. But in this case the benefit for which the tolls are paid, and tolls, it must be remembered, are an incorporeal hereditament, does not come within the description of the statute 43 Eliz., c. 2, for it is not received within the parish, but elsewhere. Upon these grounds I am clearly of opinion that the tolls rated in this case are not rateable.

LITTLEDALE, J.—I am of the same opinion. mitted on all sides that tolls, per se, are not rateable; but there are cases where the tolls arising from, and being connected with, a house or land, and giving an increased value to the house or land, varying with the profits produced by the tolls, that increased value is rateable. In all those cases, however, the profits have arisen, and the thing out of which they have arisen, has been locally situated, and actually used, within the parish where the rate was made. Here, neither the profits arise, nor is the light used, within the parish of Lydd, and, in that respect this case differs from all that have been relied upon in support of this rate. It has been urged that the light itself gives rise to the profit here, by conferring a benefit on vessels passing, for which they pay the toll; that the light is appurtenant to the light house in which it is produced; and that the profits arising from the light form part of the value of the light house, and are rateable jointly with it. But I cannot agree to this. I think the light is wholly unconnected with the light house, and that

the profits arising from the light, form no part of the value of the light house. The light is seen at a distance from the light house; it may, or it may not, confer a benefit on those that see it; it is not the produce of the light house or of the soil on which it stands, it is merely collateral to them; it is no part of the freehold; it is merely by accident or caprice that it is situated on the freehold, for it might be with equal advantage situated in other places, and produced and maintained by other ways and means. In all the cases which have been cited as authorities in favour of this rate, the profit arising from the subject-matter of the rate has arisen within the parish, and the subject-matter of the rate itself has been actually used and occupied within the parish. In the case of a canal, the person who pays the toll makes use of the canal, which is rated as land, and therefore has the actual use of the thing rated. In the case of a bridge, the bridge which is the thing rated, is actually used by the party paying the toll. In the case of a market, the tolls are paid by those who actually bring their goods into and upon the market, and the profits arise there, within the place which is rated. In the case of a soke mill, the party paying tolls takes his corn to be ground at the place rated, and has the use of the mill within the parish in respect of which the rate is made. In order to render tolls rateable, there must not only be a profit arising within the parish, but that profit must arise from the use of the thing there, and in respect of it. The vessels, in this case, have no such use of the light, for they have merely a transient view of it as they pass the light house; they do not come within the light house, as they would within a harbour or a dock, where they would have the actual use and occupation of the harbour or the dock: they not only do not come within, or near, the thing itself which is the subject-matter of the profit, but they do not even come within the parish in which it is situated. seems to me, therefore, that this case is distinguishable

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By 8 G. 3,

from all those in which tolls have been held rateable, and consequently that this rate can only be supported to the extent of the value of the light house, independently of the tolls.

Rate amended; 2,250l. struck out, and 4l. inserted.

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c. 38, a canal navigation company was established. without power to the proprietors to appropriate to themselves water raised from mines along the line of the canal. By 23 G. 3, c. 92, another canal was made, giving to the company power to take gratui-

tously the water raised

from mines within a cer-

tain distance

of that canal, " provided

the produce

THIS was an action of trespass for breaking and entering the plaintiff's close on divers days and times, between the 1st day of January, 1820, and the commencement of this action in Trinity term, 1825, and diverting from thence the water, the property of the plaintiff. Plea, not guilty, and issue thereon. At the trial before Burrough, J., at the summer assizes for the county of Stafford, 1825, a verdict was entered by consent for the plaintiff, subject to the opinion of this Court, on the following case:-

By statute 8 Geo. 3, c. 38, a company was incorporated under the name of "The Company of Proprietors of the Birmingham Canal Navigation," and empowered to make and maintain a canal from the Severn to the Trent, and two collateral cuts to certain coal mines. This act gives no power to take water from mines, or to take water raised by fire-engines out of mines. Under the powers of this act, the canal and collateral cuts were completed. One of those collateral cuts from or near Oldburgh, to or near of such mines Wednesbury, Holloway, and commonly called the Upper

was carried along some part of the canal." By 24 G. 3, c. 4, both canals were incorporated, but the provisions as to each, contained in 8 G. 3, and 23 G. 3, respectively, were to be kept distinct and separate. The proprietor of a mine on the line of the first canal, raised coal, one-third of which was afterwards carried along part of the second canal:—Held, that the company's privilege of taking mineral water did not attach to his mine on the first canal, by reason of such partial conveyance of the produce along the second.

By 58 G. 3, c. 19, reciting all the previous acts, the same system of management is extended to all the canals and cuts made under those acts:-Held, that this provision did not affect the operation of 8 G. 3, c, 38, and give the company authority to take

water raised from mines along the line of canal made under that act.

Level, passes through some premises, the mines under which, belong to the plaintiff. By stat. 23 Geo. 3, c. 92, another company was incorporated under the name of "The Company of Proprietors of the Birmingham and BIRMINGHAM Fazeley Canal Navigation," which was empowered to make, complete, and maintain a canal, commonly called the Lower Level, as an extension of one of the said collateral cuts, so made under the 8 Geo. 3, and certain other canals By section 12 of this act, it is enacted as follows:--" And whereas the making of such canals and collateral cuts will be of real advantage to the owners and proprietors of certain coal-mines, and other mines and minerals already opened, and which may be opened contiguous or near to the said canals and collateral cuts, and it will be necessary for supplying the said canals and collateral cuts with water, that the water to be raised by the fire-engines or other machines erected or to be erected for drawing the said mines, should be discharged into the said canal or collateral cuts; be it therefore enacted, that it shall be lawful for the said company of proprietors, and they are hereby authorised and empowered at all times hereafter to have, divert, and take the water to be raised or drained by means of any fire-engine, machine, or level, already or hereafter to be erected, made, or opened, in or upon any lands or mines within the distance of one thousand yards of the said canals or collateral cuts, except as is hereinafter excepted, without any recompense or satisfaction to be made by the said company of proprietors for the said water so to be diverted and taken as aforesaid." The same act contains in section 27, the following exception:-"Provided always, and be it further enacted and declared, that nothing in this act contained, shall extend to authorise or empower the said company of proprietors to take or make use of any of the water which shall be raised from any mines of coal, ironstone or other minerals, unless the coal, ironstone, or other minerals produced by such mines, shall be carried or conveyed along

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some part of the said intended canals or cuts." powers of this statute, the canals and cuts thereby authorised to be made, were completed. By the stat. 24 Geo. 3, c. 4, reciting the 8 Geo. 3, c. 38, and 23 Geo. 3, c. 92, the canals made by virtue of those acts were united and made one common concern; but it was provided, that the 8 Geo. 3, c. 38, should not apply to the canals made under the 23 Geo. 3, c. 92, and that the latter statute should not apply to the canals made under the former. By the stat. 24 Geo. 3, c. 87, the company was named "The Company of the Proprietors of the Birmingham Canal Navigations," and by that and some subsequent statutes, various alterations and improvements of the canals were authorised. By the 58 Geo. 3, c. 19, reciting the above statutes, and that it was highly expedient to extend one system of management to the whole of the canals and cuts therein referred to, in such way as to render the same more simple, and to alter such parts of the former system as were found by experience to be improper, or had been by circumstances rendered unavailing, it was enacted, "That all and every the canals, all or any of the collateral cuts, and navigable communications, so made as aforesaid by the said Company of Proprietors of the Birmingham Canal Navigations, under and by virtue of the said hereinbefore recited acts, or any of them, shall, from the time of the making thereof respectively, be, and be deemed, taken, and considered to be, part, parcel, and member of the Birmingham Canal Navigations, and all and every such part and parts of the said canals, collateral cuts, and navigable communications, and the lands, buildings, tenements, and hereditaments, already purchased or taken for the purposes thereof, by virtue and in pursuance of the powers of the said recited acts, or any of them, and as had not been already declared by any of the said recited acts to be considered as part of the works made and done under and by virtue of the said recited act, of the 23rd year of his present majesty's reign, shall be, and be considered to be, included and comprehended in, and governed by, all and every the clauses, matters, and things contained in the said recited acts, of the 23rd and 24th years of his said present majesty's reign, so far as the nature and circumstances of the case will admit (save and except so much thereof as relates to the exemptions from stamp duties, or to the quantum of rates or tolls to be collected, or as may be by this act, or have been by any other act relating to the said *Birmingham* Canal Navigation, altered or repealed), as if the same had been described in the said recited act of the 23 Geo. 3, as part of the works to be made and done under and by virtue of that act."

In the year 1819, the plaintiff and Thomas Price, deceased, became lessees of the mines under 36 acres of land, with liberty to use, at a stipulated rent, such portion of the surface as they might require for getting and working the said mines, and the term of years granted in such mines is yet unexpired. In the year 1821, the plaintiff, and his then partner, began to work the mines, and the water raised by the whimsey was conveyed by a feeder. made by the defendants, under directions of Price, to the canal, of the 23 Geo. 3, called the Lower Level. In 1821, the plaintiff, by the withdrawing of Price, became sole owner of the mines during the remainder of the lease, and as the water in the mines continued to increase he erected a fire or steam engine for draining the mines. The plaintiff's mines are situated about 200 yards from the canal called the Lower Level, and the steam engine which draws the water from them is 156 yards from the same canal. The defendants considered that, under the powers of the above statutes, they had a right to divert into this canal the water raised by the said fire or steam engine out of the plaintiff's mines, and, accordingly, by their servants, in that year, entered the premises of the plaintiff, and, by a trench, diverted the water, so raised by the engine, into the canal called the Lower Level. The defendants have repaired the trench from time to time, and have continued by means thereof, to divert the water until the commence-

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ment of the action. The canal called the Upper Level, made under the powers of the 8 Geo. 3, passes through a part of the premises, the mines under which are comprised in the plaintiff's lease. Into this branch of the canal, the plaintiff has made a basin and railroads communicating therewith, from his coal-pits, and into boats on this canal the entire produce of his mine is loaded, he having no power to communicate by water with the canal called the Lower Level, except by passing along the Upper Level to the point of junction, at a distance of about two miles, and the other parts of the Lower Level, made under the 23 Geo. 3, are more distant. Although all the produce of the plaintiff's mines, is thus, in the first instance, discharged into and carried along the Upper Level, a canal made under the 8 Geo. 3, yet as the plaintiff's customers have works and coal wharfs on various parts of the canals made under 23 Geo. 3, and subsequent acts, and the plaintiff himself is a partner with Messrs. W. Matthews and Co., in works situate on the last-mentioned canal, a portion amounting to nearly one-third of the produce of the mines, consisting of coals and ironstone, is afterwards, in the course of each respective voyage, carried and conveyed from the canal, made under the 8 Geo. 3, into and along the Lower Level, the canal made under the 23 Geo. 3.

Campbell, for the plaintiff. Upon the true construction of the acts of parliament referred to in the case, the defendants have no right to come upon the plaintiff's premises, make trenches therein, and divert the water in the manner complained of. These acts are to receive the strongest construction against the company; and no equivocal expressions, accidentally or purposely introduced, can be construed to cast an obligation on the plaintiff, which the language and general scope of the enactments do not fairly imply. The case must depend upon the construction to be given to the two statutes, 23 Geo. 3, c. 92,

and 58 Geo. 3, c. 19. It will be contended, on the other side, that all these canals are to be considered as one, and that the same privileges which are applicable to the Upper Level are equally applicable to the Lower Level; for the use of which latter canal the water in question has been Now the slightest attention to the language of the 27th section of the 23 Geo. 3, c. 92, will shew that that statute can certainly have no such construction. admitted, that the defendants would be justified in taking the water, unless the plaintiff is protected by the proviso contained in the 27th section. That proviso restrains the company from taking or using any of the water raised from any mines of coal, ironstone, or other minerals, unless the coal, ironstone, or other minerals, produced by such mines, shall be carried or conveyed along some part of the said intended canals or cuts. Now it is clear that this proviso cannot have such a literal interpretation, as shall favour the defendants' view of their rights and privileges. It is obvious that the legislature intended that the owners of mines along these canals should have a quid pro quo. and that there should be at least a reciprocity of advantage between them and the company. The new canal, or Lower Level, was clearly meant to be a vent for the produce of the adjacent mines, thereby affording great advantages to the owners thereof; who, in consideration of such advantages, were to allow the water raised from their mines to go to the purpose of feeding the canal. Some regard, however, is to be paid to the use which is to be made of the canal by the mine owners. The canal must be either the immediate vent for the produce of the mines, or it must be the means of conveyance for the whole, or substantially the whole, of the produce, before the defendants can claim the privilege of appropriating to themselves the water raised by the plaintiff. Now it is not here pretended, that the plaintiff's coals were carried immediately from the mines to the Lower Level, nor is it suggested that that canal was a means of conveyance for any more than one-third of the

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produce. It is submitted, therefore, first, that in order to justify the defendants in taking the plaintiff's water, the Lower Level must be the immediate and direct, and not the circuitous vent for the produce of his coal works; or that, at all events, it must be the means of conveyance for substantially the whole of the produce. Here both these propositions are negatived by the facts proved in evidence. If the defendants are right in their construction of the proviso above-mentioned, it would go to this—that if any parcel of coal, or ironstone, however small, were carried along the smallest portion of the canal, no matter how distant the spot might be from the mine, they would be entitled to take all the plaintiff's water. It is clear that the proviso cannot receive so literal a construction as that. Nay, it would come to this-that, even if this was done without the privity or concurrence, and even against the wishes of the owner, still the liability would attach -a construction, too violent to be maintained for a moment. Then does the 58 Geo. 3, c. 19, help the argument on the other side? It will be said, that the object of that statute was to place the Upper and the Lower Levels on the same footing in all respects, and, consequently, that if the whole produce of the plaintiff's mine is carried along the former, though not along the latter, still the same liability will attach throughout both lines. This, however, is not so; for in Rex v. The Birmingham Canal Company (a), it was expressly held, that the 58 Geo. 3, c. 19, only incorporated this canal company for the purpose of management, and had no other object in view. It clearly cannot affect the rights of third persons. and therefore its provisions cannot govern the present case.

O. Russell, contrà. The company, in this case, desire no other than a strict construction of their rights under these acts of parliament. There are two grounds on which it is submitted they are entitled to take the mineral

water in question; first, that the clauses contained in the 23 Geo. 3, c. 92, are now incorporated with the 8 Geo. 3, c. 38, and are strictly applicable to the canals made under the authority of the last mentioned act; and, secondly, that under the express words of the 23 Geo. 3, without any such incorporation, the company are entitled to take the water. The case of Rex v. The Birmingham Canal Company is no authority against the defendants upon the first point, because the decision there only went to the extent of saying, that the 58 Geo. 3, c. 19, incorporated these canals for the purpose of management, and could not be construed as applying to a question of parochial rating. It cannot be doubted, that the supplying of the canal with water comes properly within the system of management, by which the affairs of the company are to be governed; and, therefore, as far as it goes, that decision is an authority to shew, that all the previous acts and powers thereof, are incorporated by the 58 Geo. 3, c. 19, save and except the question, as to the manner in which the company are to be rated for [Bayley, J. Does not the word "maparochial taxes. nagement" mean the management of your own concerns? Can the system of management, which the company may adopt for the government of their own affairs, authorise them to take away or interfere with the rights of third persons?] The supply of the canal with water forms a most essential subject of management, in carrying on the affairs of the company. Indeed, they could not go on without an adequate supply of water. It may be admitted, that the 58 Geo. 3, cannot be construed to take away vested rights of third persons; but it is obvious that the supply of water for the purposes of the canal comes within the spirit of its provisions, and is properly the subject of management. Now the words of that statute are extremely comprehensive. After reciting all the previous acts, and that it was highly expedient to extend one system of management to the whole of the canals and cuts therein referred to, in such way as to render the same more

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simple, and to alter such parts of the former system as were by experience found improper, or had been by circumstances rendered unavailing; it proceeds to enact, "that all and every the canals so made under and by virtue of all or any of those acts, should be considered included and comprehended in, and governed by, all and every the clauses, matters, and things contained in the 23 Geo. 3, c. 92, or 24 Geo. 3, c. 4, as if the same had been described in the said recited act of 23 Geo. 3, as part of the works to be made and done under and by virtue of that act." [Littledale, J. By the 24 Geo. 3, the two canals are kept distinct; for it is thereby provided, that the powers of the 23 Geo. 3, c. 92, shall not extend to the canals made under the 8 Geo. 3, c. 38, and the 58 Geo. 3, does not incorporate the preceding acts for all purposes]. however incorporates them for all purposes, as far as circumstances will admit. [Bayley, J. It does not at all vary the powers of the preceding acts-it merely incorporates them for the purposes of management, and placing them under the same system]. Upon the second point, however, the defendants are clearly entitled to the judgment of the Court, because it is impossible to read the exception contained in the 27th section of the 23 Geo. 3. c. 92, without saying, that the plaintiff is within its operation, and that it imposes upon him the obligation of applying the waters of his mine to the uses of the canal. It is said on the other side, that the plaintiff does not come within the exception, unless the whole produce of his mine is carried along the canal. Such a construction cannot possibly be given to the exception, without defeating the whole object of the legislature in giving this privilege to the company; because it is scarcely possible to suppose, that the whole produce of the mine would be carried by water. Some of the coals must be applied to home consumption, and other parcels removed by land carriage. the condition of the liability to bear the burthen was to depend upon the whole produce of the mine being carried

along the canal, then the withdrawing the smallest part of it, and applying it to other purposes, would exempt the plaintiff from all liability. Such a construction, however, cannot fairly be put upon the statute. Then again it is BIRMINGHAM said, that in order to make the liability attach, the whole produce of the mine must be carried directly and immediately along the canal. That is also a most unreasonable construction, and quite inconsistent with the plain intention of the legislature. It is sufficient to satisfy this part of the exception, if the coal be carried along the canal, in the course of the voyage to its destination, without being carried immediately from the mine. Here the plaintiff has a beneficial use of the canal; he avails himself of the Lower Level as a channel of communication, and that is enough to bring him within the spirit and meaning of the exception.

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BAYLEY, J.—There are two questions arising in this case; first, upon the construction to be put upon the 23 Geo. 3, c. 92, before the passing of the 53 Geo. 3, c. 19; and second, upon the construction to be put upon the latter statute, and whether that statute really makes any difference in the case. By the 8 Geo. 3, the canal called the Upper Level was made. In that act there was no power similar to that upon which the question now arises, namely, that of taking the water raised from all mines. within 1000 yards of the canals, made under that act; and, therefore, the company must have made its bargain with various persons for the supply of water, on such terms as it could be obtained. The 23 Geo. 3, c. 92, contains two clauses upon which part of the argument arises. The 12th section gives to the Canal Company the power of taking water raised from all mines within 1000 yards of the canals made under that act, without making any compensation or satisfaction for it to the owners; and I have no difficulty in saying, that a clause which is to take away from individuals the right to their

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private property, must be expressed in plain, distinct, and unambiguous language. That is the rule which has been adopted in several cases; a rule which seems to me to be peculiarly applicable to the construction of private acts of parliament. The 12th section recites, that it will be of great advantage to the proprietors of certain coal mines, if certain canals and collateral cuts are made, that is to say, that it will be useful to those who shall make use of them; but not to those who have no occasion to use them. It then gives a general authority to the company to divert and take the water to be raised from any lands or mines, within the distance of 1000 yards of the canals, without any recompense or satisfaction. There is nothing here said, as to such persons as shall send their produce along the line of canal in question; it is a general provision; but then comes the 27th section, which contains an exception upon which the question turns. It provides, "that nothing shall empower the company to take or make use of any of the water which shall be raised from any mines of coal, ironstone, or other minerals, unless the coal, ironstone, and other minerals, produced by such mine, shall be carried or conveyed along some part of the said intended canals or cuts." Now the difficulty arises upon these words, which are certainly very ambiguous. When a burthen is to be cast upon the property of another person, or a right is to be taken from him without remuneration, I have already stated, that you must use plain, intelligible, and unambiguous language for that purpose. these defendants had justified the alleged trespass by a special plea, they must have averred that the coal, ironstone, and other minerals, produced by the plaintiff's mines, were carried and conveyed along some part of the said canals, or intended cuts. To what do the words "some part," apply? Clearly to the canal, and not to the produce of the mine. It is the bulk or body of the produce of the mine that is to be conveyed along some part of the canal,

before the liability to supply the water gratuitously is to attach. If issue had been taken on such a plea, would it have been established by shewing that the plaintiff had carried or conveyed along the canal, only one-third part of the produce of the mine? I apprehend not. Had the legislature introduced the words, "or some part thereof," after the words, "unless the coal, &c., produced by such mine," then the argument for the defendants would have had some weight. I therefore think that the true construction to be put upon this proviso is, that if this canal is made the general carriage-way for the bulk of the produce of the plaintiff's mines to market, then the liability attaches; but that it does not, if it is merely the channel of communication with another canal, for a part of the plaintiff's mineral produce. It is argued by Mr. Russell, that this proviso cannot receive a literal construction, because, if the smallest part of the whole produce is consumed, or carried away through another channel, the plaintiff would be thereby exempted. There is, however, no necessity for going that length. The maxim de minimis non curat lex, would apply in that case; and the liability would attach, if the general bulk of the produce was carried along the canal. For these reasons I am of opinion, that under the 27th section of the 28 Geo. 3, c. 92, the proprietors of the canal established under that act, are not entitled to take the water produced from the plaintiff's mine; and that if they are desirous of having it, they must pay for it on such terms as they can agree upon, as matter of bargain. Then the question is, as to the operation of the 58 Geo. 3, c. 19. By the 8 Geo. 3, there is a power given to make a canal, but it gives the company no such privilege as is contained in the 23 Geo. 3, c, 92; the latter statute contains a power, authorising the New Company to take water from the mines within 1000 yards of the canals. The 24 Geo. 3, c. 4, incorporates the two companies, and makes them one; but it enacts, that the provisions applicable to each company,

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shall be kept separate and distinct; and, therefore, the canal established by the 8 Geo. 3, would be a continuing canal, without being subject to the operation of the privilege contained in the 23 Geo. 3. Then the 58 Geo. 3, reciting all these acts, incorporates the canals, and declares that they shall be subject to the operation of all the clauses of the 23 Geo. 3, and the 24 Geo. 3. The canal made under the 8 Geo. 3, however, continues still the same, and all the mines within 1000 yards of the canal remain still exempt from the liability of supplying water, raised by engines and other machinery. argued, that the operation of the 58 Geo. 3, is to place all the canals on the same footing as the canals made under the 23 Geo. 3; and that the 12th and 27th sections of that statute are to be imported into the 8 Geo. 3, and so to cast the burthen of supplying water upon all the mines within 1000 yards of the canals formed under that act. means concur in that proposition. If such had been the intention of the legislature, I should have expected to find it expressed in the recital of the act, or that a substantive clause should have been introduced to that effect; but the act is totally silent upon this point. It seems to me that the object of the 50 Geo. 3, was to place all the canals, made under the several acts of parliament, upon the same system as to management; but to leave the rights of third persons, under the 8 Geo. 3, on the same footing on which they were found at the time of the passing of the former statute. I am, therefore, of opinion, that the defendants were not warranted in taking the water from the plaintiff's mines. under the authority given by the 23 Geo. 3, c. 92, and, consequently, that judgment must be given for the plaintiff.

HOLROYD, J.—I am also of opinion, that the defendants were not entitled to take the water in question. I think that the 58 Geo. 3, does not at all affect the present case, because it left the canal made under the 8 Geo. 3, for this purpose, precisely as it was before; and only sub-

jected all the different canals to the same system of management, quoad the regulation of the company's own affairs. Then, as to the effect of the 27th section of the 23 Geo. 3, I am clearly of opinion, that the company were BIRMINGHAM not authorised in taking the water from the plaintiff's mines, without making a compensation, inasmuch as the substantial produce of his mines was not immediately embarked upon, or carried or conveyed along, the line of the Lower Level.

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LITTLEDALE, J., concurred.

Postea to the plaintiff.

## SIMMONS v. SWIFT.

THIS was an action of indebitatus assumpsit for a A contract of quantity of oak bark, sold and delivered by the plaintiff tered into in to the defendant, with the common counts, and a count these terms,—"I have this upon an account stated. Plea, the general issue. At the day sold the trial before Littledale, J., at the Lent assizes, for the county of Monmouth, 1826, a verdict was found for the per ton of plaintiff, for the sum of 1061. 3s. 8d., subject to the hundred opinion of this Court, on the following case:-

The plaintiff and defendant were both dealers in timber agrees to take, and bark, the plaintiff residing at Whitebrook, in Monmouthshire, and the defendant in the town of Monmouth. Previously to the 23rd day of October, 1824, the plaintiff bark was, in a was possessed of a quantity of oak bark, which was stacked few days afterat a place called Redbrook, on the banks of the river Wye, ed and deliabout two miles below the town of Monmouth, and which, in July preceding, weighed about twenty tons. Upon the refused to 23rd of October, the following agreement for the sale of take away the remainder:the said bark, was signed by the plaintiff and the de- Held, that the

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sale was enbark stacked at R., at 91. 5s. twenty-one weight, to H.S., which he and pay for it on the 30th of November." wards, weighvered to the vendee, who property

in the residue did not vest in the vendee until the weight had been ascertained, and consequently, that neither an action for-goods sold and delivered, nor for goods bargained and sold, would lie against the vendee for the amount.

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fendant:--" I have this day sold the bark stacked at Redbrook, at 91. 5s. per ton of twenty-one hundred weight, to Hezekiah Swift, which he agrees to take, and pay for it on the 30th of November." It was afterwards verbally agreed between the parties, that one William Simmons, a brother of the plaintiff, should see the bark weighed on behalf of the plaintiff, and that one James Diggett should see it weighed on behalf of the defendant. Within five days after the signing of this agreement, the defendant sent several of his barges and his servants to Redbrook, and took a quantity of the bark amounting to eight tons, fourteen hundred weight. He sent for William Simmons, who was at work in a wood near to Redbrook, to see the bark weighed on behalf of his brother, which William Simmons accordingly did, and was paid for his trouble by his bro-William Simmons said he was not directed by his brother to see the bark weighed, and did not know that it had been sold, until he was fetched from the wood by the defendant's messenger. James Diggett attended the weighing on the part of the defendant. The bark so taken by the defendant, was carried by his barges down the river Wye to Chepstow. The remainder of the stack was covered with a tarpaulin belonging to the defendant, but which tarpaulin had been upon the premises at Redbrook, having been lent by the defendant for that purpose to the person who sold the bark to the plaintiff, and had been used to cover a part of the stack, before the signing of the agreement by the plaintiff and defendant. About eight or nine days after part of the bark had been so removed by the defendant, a Mr. James Madley, upon whose premises at Redbrook the bark was stacked, met the defendant, and asked him when he intended to take the remainder of the bark away, as it was stacked over part of a sawpit which he (Madley) wanted to use; the defendant answered, that he should have it taken away in a few days. The defendant did not at any time take away the remainder of the bark; nor was it weighed. Towards the latter end of

Nevember there was an extraordinary flood, which overflowed the banks of the river Wye, and rose nearly to the height of five feet around the remainder of the stack of bark, and did it very considerable injury. sufficient time for the defendant to have removed the whole of the bark before the flood happened. The defendant was seen examining the remainder of the bark after it had been injured by the flood, and the tarpaulin before-mentioned remained upon the bark until the 28th of January, 1825, when it was removed by some of the defendant's servants, who were passing up the river in a barge. On the 4th day of December, 1824, the plaintiff called at the defendant's counting-house, and the defendant said he was ready to pay for the bark which had been removed, namely, eight tons, fourteen hundred weight; and, by the plaintiff's direction, an account was made out of the bark, which the defendant had taken away as aforesaid, and the defendant paid the amount by a check which was duly honored. The plaintiff signed the account as settled, but, at the same time, said that no advantage should be taken of his so doing, and required the defendant to take and pay for the rest of the bark, which he refused to do. Bark is an article which varies considerably in weight, according as the air is moist or dry, and according to the season of the year. The question at the trial was, whether the plaintiff was entitled to recover in this action for the bark which remained standing at Redbrook. According to the weight of the bark in July preceding, a quantity of bark remained, which at the pricementioned in the agreement of 23rd of October, 1824, amounted to the sum of 1061. 5s. 8d., for which sum the verdict was taken.

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O. Russell, for the plaintiff. This action for goods sold and delivered is maintainable. The criterion for determining whether a delivery of part of a commodity sold under an entire contract, will support an action for

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goods sold and delivered, is, whether the right of property is vested in the vendee by the act of sale. Here it is submitted that the right of property in this bark vested in the defendant as soon as the agreement for sale was signed, and the subsequent delivery of a part is, in law, to be considered as a delivery of the whole. The cases of Slubey v. Hayward (a), and Hammond v. Anderson (b), establish this position, that where a part of goods sold under an entire contract is taken possession of by the vendee, that possession vests the whole of the property in him, and the delivery of part is a delivery of the whole. On the authority of those cases, the plaintiff is entitled to maintain this action. It will be said on the other side, upon the authority of Hanson v. Meyer (c), that the property in the bank did not vest in the vendee, because something remained to be done by the vendor, namely, the act of weighing in order to ascertain the price of the commodity. The force of that argument must depend upon the question, whether weighing was or was not a condition precedent. tended, that by the terms of the contract of sale, and the facts found in the special case, the act of weighing was not necessary to be done, in order to vest the property in the vendee, so as to prevent the rule of law as to a part delivery in the name of the whole, from applying. The contract here is for an absolute sale of the bark; and the defendant agrees to take and pay for it on the 30th November. There is no expression in the contract which imports that the bark was to be weighed. The weight must indeed be taken to have been known, for it is stated in one part of the case, that in the July preceding the bark weighed twenty tons; and, therefore, it is not like a case where the parties have no previous knowledge of the quantity of the commodity sold. An absolute sale takes place in October, and part of the bark being shortly afterwards delivered in pursuance of the contract, the property in the whole was absolutely vested in the defendant,

<sup>(</sup>a) 2 H. Bl. 504.

<sup>. (</sup>b) 1 N. R. 69.

<sup>(</sup>c) 6 Past, 614.

who thereby became hable to pay for the amount if he neglected to take the remainder away. Suppose an action had been brought after the 30th of November to recover the price, would it have been any answer on the part of the defendant, that the bark had not been weighed? It is submitted that it would not, and that Hanson v. Meyer, (the doctrine of which is not disputed), is no authority for holding the contrary. [Holroyd, J. The defendant was not bound to pay for the bark until the 30th November, which shews that he could not take it away until that period without paying for it]. It is submitted that he might have taken away the whole immediately, although . the stipulation is, that it is to be paid for on the 80th November. He has credit for it until then, but the right of property vests immediately upon sale. [Bayley, J. If he might take it away before the 30th November, the vendor would lose his lien]. But here is credit given until the 30th November; and, therefore, the defendant had a perfect right to take it away at any moment he pleased; and, in fact, within five days after the signing of the agreement, the defendant takes away eight tons, fourteen hundred weight. In Hanson v. Meyer, there were two conditions precedent before the right of property vested in the bankrupts; first, payment for, and second weighing, the commodity. Here the plaintiff sells "the bark stacked at Redbrook." This is a sufficient designation of the quantity and the character of the commodity sold, and differs the case from Hanson v. Meyer. Nothing remained to be done to give the defendant a complete title to the property within the terms of the contract, which is perfectly silent on the subject of weighing. [Bayley, J. It does not appear by the terms of the contract, what is the quantity sold, or the price to be paid. It is sold at so much per ton of 21 cwt; and, therefore, it must have been weighed to ascertain the quantity]. The weight must have been known, it having been weighed in the preceding July. But here there is, in fact, a part

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delivered, which gives the defendant a title to the whole. [Holroyd, J. Although the defendant might have carried away a part, it does not therefore follow that he would have a right to take away the remainder until the price was paid. At all events it is submitted that the defivery to, and acceptance by, the defendant of a part of the commodity sold, would render him liable for any risk arising from the remainder continuing in It is clear that for some the possession of the vendor. purposes, the property vested in the defendant by the sale and delivery of part, and the question is, whether it did not vest in him, under the circumstances of this case, for all purposes. Since Hanson v. Meyer, there have been several similar cases in which it has been held that the property in goods sold did not pass by the mere contract of sale; such as Rugg v. Minett (a); Wallace v. Breeds (b); Austen v. Craven (c); White v. Wilks (d); Bush v. Davis (e); Whitehouse v. Frost (f); Shipley v. Davis (g); but why did not the property pass in these cases? Because in every one of them, by the terms of the contract, or by the acts of the parties, or by the usuage of the trade, there was something more to be done to the commodity before the property passed to the vendee. [Bayley, J. This, you will recollect, is an action for goods sold and Now, when do you say there was a delivery?] I say that the instant any part was delivered, that was a delivery of the whole. [Littledale, J. In Hanson v. Meyer, there was a delivery of part of the goods, and yet, that was held not sufficient to constitute a delivery of the whole. In the case of Slubey v. Hayward (h), which you have cited, the question was as to the right of stoppage in transitu]. It must be contended here, that the property in this bark passed the moment the agreement for the

<sup>(</sup>a) 11 East, 216.

<sup>(</sup>b) 13 East, 522.

<sup>(</sup>c) 4 Taunt. 644.

<sup>(</sup>d) 5 Taunt. 176.

<sup>(</sup>e) 2 M. & S. 397.

<sup>(</sup>f) 12 East, 614.

<sup>(</sup>g) 5 Taunt. 617.

<sup>(</sup>h) 2 H. Bl. 504.

sale was signed. In 2 Bl. Com. 448, it is said, "As soon as the bargain is struck, the property of the goods is transferred to the vendee, and that of the price to the vendor, but the vendee cannot take the goods until he tenders the price agreed on. But if he tenders the money to the vendor and he refuses it, the vendee may seize the goods, or have an action against the vendor for detaining them, And by a regular sale, without delivery, the property is so absolutely vested in the vendee, that if A. sells a horse to B. for 101., and B. pays him earnest, or signs a note in writing of the bargain, and afterwards, before the delivery of the horse or money paid, the horse dies in the vendor's custody, still he is entitled to the money, because by the contract, the property was in the vendee" (a). So in Now's Maxims, 88, it is said, "If I sell my horse for money, I may keep him until I am paid; but I cannot have an action of debt until he be delivered; yet the property of the horse is by the bargain, in the bargainor or buyer. But if he do presently tender me my money, and I do refuse it, he may take the horse, or have an action of detainment. And if the horse die in my stable, between the bargain and the delivery, I may have an action of debt for my money; because, by the bargain, the property was in the buyer." [Holroyd, J. Here you have not declared for goods bargained and sold, but for goods sold and delivered. Could there be a delivery, when some act antecedent to delivery remained to be done?] But if the property vested in the vendee by the sale, which it is submitted it did. then delivery of part, is a delivery of the whole, to support this action. What remained to be done to the bark, was not any thing to the property itself, the right to it being absolutely devested out of the plaintiff by the sale. In Chaplin v. Rogers (b), it was held, that after a bargain and sale of a stack of hay between the parties on the spot, evidence that the vendee actually sold part of it to another person, (by whom, though against the vendee's (a) See Hinde v. Whitehouse, 7 East, 558. (b) 1 East, 191.

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there was such a delivery as would support this form of action.

BAYLEY, J.—There are two questions in this case for the consideration of the Court; first, whether the property in this bark was vested in the defendant so as to throw all risks upon him; and secondly, whether the bark was delivered so as to enable the plaintiff to recover in this form of action. It is much more satisfactory to me to express my opinion upon that question which involves the justice of the case, than turn the plaintiff round upon that which is mere form, and thereby invite him to try his right, at the hazard of another action; and, therefore, I shall meet the first question, although it is not necessary to decide it for the purpose of the present case. I am of opinion, that the property in this bark did not so vest in the defendant as to make him liable for the loss which' has happened. Generally speaking, where there is a bargain made for the purchase of goods, and nothing is said at the time about the delivery or the time of payment, the property in them vests immediately, so as to subject the buyer to all future risks, provided nothing remains to be done on the part of the seller, although, in that case the buyer will not be entitled to take away the goods without payment of the price; but if nothing remains to be done on the part of the seller to complete the contract, and nothing is said as to the time of payment or delivery, and in the mean time, an accident happens before they are taken away, the buyer must take the consequences. If, however, any thing remains to be done on the part of the seller, till that act is done, the property does not vest in the buyer so as to subject him to all risks. That rule is settled in a variety of cases which have occurred. In Rugg v. Minett, Wallace v. Breedes, and several other cases, the thing which remained to be done was something to vary the nature or quality of the commodity itself before delivery, and which was to be done by the seller. In other cases, what remained to be done by the seller was, separating from other goods those which he had been selling; and in two or three other cases it was impossible for the buyer to lay his hands upon any specific portion of the bulk, part of which he had sold. This is a case of a very different description. In this case the subject of the sale was clearly and distinctly ascertained, that is to say, all the bark lying stacked at a particular place called Redbrook. The only thing which remained to be done on the part of the seller was, to have it weighed, in order that the price might be ascertained. The bargain says nothing as to the mode in which the weight is to be ascertained. it says is, " I have this day sold the bark stacked at Redbrook, at 91. 5s. per ton of twenty-one hundred weight, to Hezekiah Swift, which he agrees to take, and pay for it on the 30th of November." Something has been said in the argument, with a view of shewing that, upon the construction of the terms of this agreement, the defendant would have been at liberty to take away the bark on or before the 30th of November, without paying for it. It is not necessary for me to give any opinion upon that point, because the case does not distinctly turn upon it; but inasmuch as the bark is to be paid for at 91. 5s. per ton, and as the price could not be ascertained until the act of weighing took place, which was an essential thing to be done by the seller, the property in the bark did not, in my opinion, vest in the defendant until that act was done. It is clear that the seller had a right to insist upon the actual possession of the bark remaining with himself, or under his control, until the act of weighing was com-If the plaintiff had intended to get rid of his own liability to any risk to which the bark might be exposed, he might have given notice to the defendant that he would, at a given period, cause the bark to be weighed and the price ascertained, and thus have cast upon the defendant all liability for risk. That was a matter of option with himself, but until he had performed the act of weighing, either at his own instance, or at

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the desire of the defendant; I think that all the consequences arising from the bark being allowed to remain in the possession of the seller, must be at his risk, and not at that of the buyer. In Hanson v. Meyer, the only thing to be done was to weigh the commodity sold. The price of the starch sold, was to be ascertained by the act of weighing, although there was no express stipulation in the contract that it was to be weighed. Until weighed, the price could not be ascertained. So here, the nature of the contract rendered weighing necessary, for without it, the vendee could not know what he had to pay. Suppose, instead of an action of indebitatus assumpsit, the plaintiff had declared specially upon this contract, he must have stated the contract in its terms, and have alleged that the article had been weighed, and that it amounted to so many tons, and that the price in the whole amounted to such a certain sum of money; and then it would have been incumbent on him to have proved those averments, for otherwise he could not have been entitled to recover. He must have proved an actual weighing before he could have recovered the price, and the article must have remained in his possession and control, until the weighing had taken place. The case of Hanson v. Meyer is certainly distinguishable from this in one respect, namely, that in that case, the assignees of the vendee, who had become bankrupt, claimed a right to recover the starch by an action, which raised the question, whether a delivery of part of the commodity was to be considered a delivery of the whole; but the language of Lord Ellenborough in that case is certainly very material in the consideration of the present case, as to the necessity of weighing the commodity sold, in order to ascertain the price before the property could be changed. In that case, 61. per cwt. was to be the price of the article sold, and weighing was an essential process before the price could be ascertained; and Lord Ellenborough there says, "By the terms of the bargain, formed by the broker of the bankrupts

on their behalf, two things in the nature of conditions or preliminary acts on their part, necessarily preceded the absolute vesting in them of the property contracted for. The first of them is one which does so, according to the generally received rule of law in contracts of sale, viz. the payment of the agreed price or consideration for the same. The second, which is the act of weighing, does so in consequence of the particular terms of this contract, by which the price is made to depend upon the weight. The weight, therefore, must be ascertained, in order that the price may be known and paid; and unless the weighing precede the delivery, it can never, for these purposes, effectually take place at all." In that case, Lord Ellenborough was clearly of opinion, that weighing was an essential ingredient in the transaction, and that before it took place, the property could not be considered as being absolutely vested in the vendee. In this case also, I am of opinion, that inasmuch as the price was to be ascertained by the act of weighing, until the weighing took place, the property was to be considered as being under the vendor's control, and at his risk, and not at the risk of the vendee. Upon that point, independent of the question of delivery, I think the plaintiff is not entitled to recover, but even if the property had vested in the defendant, my impression is, that there had not been such a delivery as would entitle the plaintiff to recover on a count for goods sold and delivered. But for the reasons I have already mentioned, I prefer founding my judgment upon the other point.

HOLROYD, J.—I also think that the plaintiff is not entitled to recover. In the case of a sale of specific goods and chattels, where the quantity is ascertained or designated, it may be taken as a general position, that the property is altered by the sale, notwithstanding the vendor is not bound to deliver until the price is paid, except where there is a stipulation for credit or payment at a future time, which would be inconsistent with the doctrine of lien; but in a case like the present, where something

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remains to be done, the property in the goods does not pass to the vendee, but continues in the vendor, and at his The case of Hanson v. Meyer appears to me directly to decide the present case. From the nature of the dealing, the goods were to be paid for at so much per cut., to be ascertained by weighing. The vendor, therefore, would not be bound to part with the goods until the weighing had taken place, and the amount in value had been thus ascertained. Hanson v. Meyer then is a direct authority on that point. But in the second place, I think there has been in this case no delivery, for if there was a delivery, the vendor could have no lien for the price, even assuming that by the terms of the contract, the goods could not be taken away till the 30th November. circumtance shews that, although there had been a delivery of part to the defendant, with the consent of the vendor, the delivery of that part would not amount to a delivery of the rest, and therefore, I likewise think that in point of form, an action for goods sold and delivered cannot be maintained. It appears to me, that the action could not be maintained even if the contract was declared upon specially, for the want of the vendor's having performed the act of weighing, which according to Hanson v. Meyer, was an indispensable condition before the action could have been supported.

LITTLEDALE, J.—I think the action is not maintainable; but I entertain some doubt whether the property did not pass in consequence of the general terms of the contract, and that doubt, as it seems to me, is not inconsistent with the judgment of the Court in Hanson v. Meyer. In that case the question was, not so much whether the property actually passed to the assignees of the purchaser, as whether they had a right to call for the delivery of the goods sold. Lord Ellenborough, in the outset of his judgment, said, "that the payment of the price, and the act of weighing the goods, necessarily preceded the absolute vesting of the property contracted for." That expression, I apprehend, must be understood with reference to the question then

vested in the purchaser as to entitle his assignees to have the actual possession. The whole case turned upon that, and all the rest of the argument went upon the question, whether there was an actual delivery. In this case there was an actual delivery of part of the goods, but the vendee's right to the possession of the remaining part could not have vested until the weight of the bark had been ascertained, and the price paid; and, for the same reason, I do not consider that the fact of the delivery in part would make a delivery in the whole. This is an action for goods sold and delivered, and I think that the plaintiff could not maintain such an action under the circumstances of this case. This case differs from Slubey v. Hayward, and Hammond v. Anderson, where the question of lien or of stoppage in transitu arose, and in which it was considered that a delivery of part was not to be treated as a waiver of the lien or right to stop in transitu, and gave the vendor a right to bring an action for goods sold and delivered, for the rest. I certainly think that an action in this case could not be maintained for goods sold and delivered. I had, however, thought that the property did pass for some purposes, though not for the purpose of maintaining an action for goods bargained and sold. The mere bargain would not be sufficient, because no specific price had been fixed and ascertained; nor could the plaintiff, for the same reason, recover upon a quantum

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upon the special contract.

have lain upon the contract, for want of notice on the part of the seller to the buyer, that he had intended to weigh, and did weigh the goods. For these reasons, though I am inclined to think that the property did pass for some purposes, yet, I am of opinion that no action would lie for goods sold and delivered, goods bargained and sold, or

Neither do I think that a special action would

<sup>(</sup>a) See Bloxam v. Saunders, ante, vol. vii., 396, and the cases there collected.

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A corporator accepting a new office incompatible with the old one, thereby absolutely vacates and surrenders the latter, and if he is ousted of his new appointment by quo warranto, he is not remitted to his original character, nor can a vote given at a corporate meeting whilst he filled the higher office de facto, be referred to his original office of an inferior degree.

## The King v. Francis Hughes.

THIS was an information in the nature of a quo warranto filed against the defendant, for usurping the office of mayor of the town and borough of Stafford. In the defendant's plea, a charter of the 12 Jac. 1, was set out, by which the king granted to the bailiffs and burgesses of Stafford, that they should be a body corporate, and that there should be a mayor, ten aldermen, and ten capital Averment that the charter was accepted, and burgesses. that the defendant was duly elected and sworn mayor in pursuance of the direction of the said charter. plea there were several replications and issues taken thereon, raising different questions of law and of fact. The material issue of fact, upon which the opinion of the Court was founded, was, whether there were present at the defendant's election, on the charter day in 1825, a majority of the capital burgesses, which question involved the eligibility of certain individuals, claiming to be capital burgesses, to vote at the election. At the trial before Park. J., at the 'Lent assizes for the county of Stafford. 1826, the evidence as it related to the issue so raised, was in substance this: -- By the charter 12 Jac. 1, the corporation consists of a mayor, ten aldermen, and ten capital burgesses, and vacancies in the body of aldermen occasioned by death or a motion, are to be filled up from the capital burgesses. The defendant was elected mayor on the 24th October, 1825, and on that occasion there were present four capital burgesses, and eight aldermen; two of the aldermen named Turnock and Knight, had been removed from their office by judgment of ouster in Hilary term, 1826, upon a quo warranto information, which charged that they, on the 20th September, 1824, had wrongfully exercised the office of aldermen. It appeared that Turnock had been elected an alderman on the 20th September, 1824; and on the same day a person named

Rogers was elected in his stead as a capital burgess. In this election Turnock concurred, and Rogers' ever after continued to exercise the office of a capital burgess, and Turneck also continued to exercise the office of alderman, until he was ousted as above mentioned. With respect to Knight, it appeared that he was elected an alderman on the 14th October, 1821, and the vacancy occasioned thereby in the body of capital burgesses, was filled up by a person named Hawthorn, and at his election, Knight acted and gave his vote, and Hawthorn continued ever after to act as a capital burgess. The election of Rogers and Hawthorn completed the number of ten capital burgesses, exclusive of Turnock and Knight, who had become In October, 1824, Turnock was elected a aldermen. justice for the borough, and was sworn in as such, and continued to serve the office until he was ousted as above mentioned. Knight was elected and sworn in as a justice in 1821, 1822, and 1823. The charter contains a provision restraining persons from being eligible to be elected justices for the borough until they have been aldermen. Under these circumstances, it was contended on the part of the orown, that the election of the defendant, as mayor, in 1825, was void, inasmuch as there were then present only four capital burgesses, instead of the requisite number, six. To this it was answered, that Turnock and Knight, who were present at the election, and voted as aldermen, were not in point of law aldermen, and therefore had never ceased to be capital burgesses. The result, therefore, was, that there were present at the election, a majority in the defendant's favour, of six aldermen and six capital bugesses. The learned Judge was of opinion that Turnock and Knight continued to be capital burgesses, if they were not aldermen, and under his direction the jury found for the defendant, with liberty to the relator to move to enter a verdict for the crown. A rule nisi having been obtained for that purpose in Easter term, cause was now shewn by

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O. Russell, R. Bayly, and Talfourd. The question is, whether Turnock and Knight, by accepting the office of aldermen, to which it appeared in the result they had no title, were precluded from voting at the election in question as capital burgesses. It is true that they were aldermen de facto, but not de jure, as appears by the judgment of ouster against them in Hilary, 1826. They are, therefore, to be considered in the same light as if they had never been aldermen; Rex v. Hughes (a), Rex v. The Mayor of York (b); and, if so, then they are thrown back to their original situation as capital burgesses, and in that character their votes may be counted. [Bayley, J. The question is, whether the acceptance de · facto of an incompatible office, no matter by what title, is not virtually a surrender of a preceding office held by the same party?] It may be admitted that the acceptance of a valid appointment will vacate a prior situation held by the same person, but the moment it is shown that the new appointment is a bad one, it goes for nothing, and the party is remitted to his original character. Acceptance of a bad lease will not conclude the party who may have surrendered a former one; Roe d. Lord Berkeley v. The Archbishop of York (c). [Bayley, J. That was the case of a private right. Here public rights are concerned. Here there has been no absolute surrender of the office of capital burgess. It is only a conditional surrender, and if the condition fails, then the party has a right to fall back upon his original rights; otherwise it would be a great hardship upon a public officer, who had accepted a higher situation upon an understanding that he was to continue in possession of it. If then these gentlemen were never rightful aldermen, they have at least a title to the situation which they had conditionally resigned.

Campbell and Merewether, contrà, were stopped by the Court.

<sup>(</sup>s) Ante, vol. vi., 443. 4 B. & C. 368. (b) 5 T. R. 66. (c) 6 Best, 86-

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BAYLEY, J.—The question in this case is narrowed to the single point, whether the election of the defendant in the year 1825, was or was not a good and valid election. I am of opinion that the defendant has not been duly elected, and that the verdict must be entered for the crown. The corporation consists of a mayor, ten aldermen, and ten capital burgesses; and it is conceded that in order to make a good election, there must be the mayor, and a majority of the aldermen, and a majority of the capital burgesses present. The objection here is, that at the election in 1825, there was not present a majority of the capital burgesses, for that there ought to have been six. There were present four persons who were de facto capital burgesses. There were also eight persons, who were de facto aldermen at that time; but two of those persons were afterwards ousted from office, and then the question is, whether, by being removed from the office of aldermen, they became ipso facto capital burgesses. If they are to be so considered in point of law, we must be bound by the law; but I am of opinion, under the circumstances of this case, that cannot be the law. In 1821, two of those persons named Turnock and Knight, two of the eight aldermen, were elected from the office of capital burgesses into the office of aldermen, and they were sworn into that office. From that time until the period of this election in 1825, they exercised the duties of the office of aldermen, but they ceased to exercise the duties of Upon their being appointed aldercapital burgesses. men, vacancies were declared in the number of capital Those vacancies were filled up, and they themselves concurred in filling them up. From 1821, down to the period in question, the duties of capital burgesses were discharged, not by Turnock and Knight, but by those persons who were introduced into their situations as capital burgesses. It is true they were not legal aldermen, but they were aldermen de facto, and if they had continued so for a period of six years, 3 A VOL. VIII

The Kind v. Hudges. they would have been good aldermen and unimpeachable; but having been removed from that office, they insist, as a position of law, that they never vacated the office of capital burgesses, and that from 1821 until they were removed from the office of aldermen, they continued capital burgesses. Now I find it laid down by my Lord Chief Baron Comyn, in his Digest, tit. Officers [K 5], "that a man shall lose his office if he accepts another office incompatible." It does not say, if he shall be duly elected, but if he accepts another office which is incompatible. Then, are the offices of aldermen and capital burgesses incompatible? I should say they clearly are. There is no doubt that these two persons accepted the offices of aldermen; they were sworn into them; they discharged all the duties of them, and if six years had elapsed they would have been good aldermen. no hardship imposed upon them in saying, that the legal result of this is, that they ceased to be capital burgesses. On the contrary, would not a very great hardship result to other parties, if they were at liberty to say that they never ceased to be capital burgesses? One consequence, among many others, would be, that every act done by the parties introduced into their places as capital burgesses would be illegal; and in every instance in which they concurred in giving an opinion or a vote in common council, they would be liable to be ousted by quo warranto. treated as wrong doers, and be subjected to fines. Besides, on the election of these two persons as aldermen. the corporation state there is a vacancy in the office of capital burgesses. Knight and Turnock both concur in making that statement, and Hawthorn and Rogers are introduced into their situation as burgesses. . Well, then, who ought to suffer? If any body ought, the party who lends himself to mislead, and not the party who is deceived. It is the duty of a person elected to the office of alderman, to investigate his title, and ascertain whether he is duly elected or not. His attention is directed to the

circumstances of the election, he is a party to it, and he, at his peril, ought to take care that it is a valid election before he takes upon himself to exercise the office; and if it turns out that he accepted it improperly, is he to be restored to every thing which he had previously given up; and is the person introduced into his place to be treated as a wrong doer, and to be entirely removed? there was a pecuniary compensation for the discharge of the duties of a capital burgess, who ought to have it? Clearly the man who, from the year 1821 down to the election in 1825, has been discharging those duties, and not the party who, during that time, has abstained from discharging those duties, and who has actually concurred in filling the office and place with another person. There is not, therefore, as it seems to me, any inconvenience or difficulty resulting from this view of the case, and, indeed, I do not see how the objection could be got over. Turnock and Knight never ceased to be capital burgesses. it might happen that, under certain circumstances, there would be more than ten capital burgesses, which would be a violation of the charter, or the two persons must be considered as filling the same office at the same time, which would involve a great absurdity. Here are two persons elected into the office of aldermen; they are removed. Suppose the removal not to have taken place until after the expiration of six years from the time they were originally put into the office of aldermen, in what condition would those persons have been who had been introduced into their places as capital burgesses? They had been elected capital burgesses; they had been sworn in and admitted; they had discharged the duties of capital burgesses for a period of six years, and they would have been protected by the statute 32 G. 3, c. 58, s. 1, against a quo warranto information. They would, therefore, have been good, unimpeachable, capital burgesses. Then, in what condition would the corporation be? There would be ten good capital burgesses, with reference to whom no

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question could be raised, and Turnock and Knight would be supernumeraries. If they never ceased to be capital burgesses, there would be a mayor, aldermen, and twelve capital burgesses, which would be a violation of the charter. That would be one of the consequences resulting from a decision, that Turnock and Knight still remain capital burgesses. On the other hand, it seems to me to be a plain, intelligible, and reasonable rule to lay down, that if you-accept an office which is incompatible with the office which you had previously filled, you are to be considered as vacating that office; and if you are removed from the higher office which you had accepted, it does not restore you back again to the office you had previously vacated, for that is still well filled by the person introduced into it in your room and stead. For these reasons I am of opinion that Rogers and Hawthorn were both good capital burgesses (though it is not necessary to decide that question), but that neither Turnock or Knight was a capital burgess at the time of the election in 1825, and, therefore, the essential number of capital burgesses was not present at the time of that election, and, consequently, the rule for entering a verdict for the crown must be niade absolute.

HOLROYD, J.—I am of the same opinion. It does not appear to me that the least doubt can be entertained upon this question. At least, there is none in my mind. I think that when Turnock and Knight accepted the office of aldermen to which they were elected (whether legally elected or not), and when they took upon themselves to perform the duties of the office to which they were admitted, they virtually ceased, from that moment, any longer to retain the office of capital burgesses. The charter directs that there shall be a certain number of aldermen, and a certain number of capital burgesses. It is admitted that, if any of the capital burgesses are removed so as to become good aldermen, they cease to be

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capital burgesses from the time when they accept the office of aldermen. So, if a capital burgess be removed and become an alderman de facto, I apprehend he ceases to be a capital burgess, and another person is to be elected in his stead; for, otherwise, there would not be the full number of corporate officers. If the acceptance of the office of alderman did not operate as a vacating of the inferior office, one of those consequences pointed out by my brother Bayley, would follow, namely, there would be more than the full number of capital burgesses authorised by the charter, or two persons must have held the incompatible offices of aldermen and capital burgesses at the same time. I fully concur in the opinion delivered by my brother Bayley, and think with him that judgment

must be entered for the crown.

LITTLEDALE, J.-- I am entirely of the same opinion. In this case, in order to make a valid election, it was necessary that there should be six capital burgesses. point of fact there were only four persons who were at that time in possession of, and discharged the duties But, it is said, that there were two of, that office. other persons present, who were then discharging the duties of aldermen, but who, being afterwards ousted from that office by judgment in a quo warranto, are to be remitted to their original character of capital burgesses, from which they were elected into the office of aldermen; and that being so remitted, although they appeared and filled the character of aldermen at the election, yet the law will refer their votes to the legal right which they had, and they ought to be considered as having voted in their character of capital burgesses. I should doubt if that would be so, even if they could be remitted by law to their original character. true, they did not deliver in any statement to the presiding officer, intimating in what character they voted: but assuming that if it could be made out on the part

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of the defendant that they had a right to be remitted back to their original character, and assuming that their votes ought to be considered as having been given in that character which the law would allow, still the question is, whether they had a right to consider themselves as capital burgesses at the time of the election. The general rule is, that if a man accepts one office incompatible with another, it operates as a surrender, or abandonment, or deprivation of the first office. Besides the authority referred to by my brother Bayley, in Rex v. Trelawney (a), Lord Mansfield said, he should be inclined to think that if the two offices of steward and burgess are incompatible, the acceptance of the latter would be an implied surrender of the former. That point is certainly not expressly decided there, but I concur entirely in the opinion so intimated. It is conformable to all the notions I have ever entertained of corporation law; it is founded in reason and principle, and the greatest confusion would be produced if it were not so. Now, it seems to be admitted on the part of the defendant, that if a person had accepted an office to which he had a good title, such acceptance must be considered as a deprivation or surrender of the first office; but it is said, that this rule does not apply if it turns out that the party cannot make a good title; and in that case, he may go back to his original seat. But I do not concur in that position. It seems to me that if he accepts an incompatible office, no matter by what title, he is to be concluded by the vacancy he has occasioned, and he shall not be at liberty afterwards to take advantage of his own wrong, and turn out persons who have been rightfully elected in his stead. He was bound in point of law to take care that he had a good title to the new, before he abandoned the old office. He vacates the old office at his own peril. In the case of Roed. Lord Berkeley v. The Archbishop of York (b), a question arose as to the effect of a surrender of a lease. That was the case of a

(a) 3 Burr. 1616.

(b) 6 East, 86.

private right. The question there was merely in what nature or character a person had title to land, of which he had never abandoned the possession; but here the question concerns public rights; it is not a mere question of a man's own title. A man has title to the office of an alderman, not for his own benefit, but for the purpose of discharging a public duty, in the good government of the borough. Another thing to be observed here is, that the parties actually abandon the former office, and accept another, the duties of which they cannot exercise consistently with the duties of the old office; and not only so, but these two persons actually concur in nominating their successors to the office which they have given up. seems to me, that if there had been an issue to try whether Turnock and Knight had resigned their office of capital burgesses, there would be abundant evidence to make out the affirmative of that proposition. It is not necessary that a resignation of such an office should be by deed or writing. In Rex v. The Mayor of Rippon (a), it was held, that a resignation by parol was sufficient, it having been made at a corporate meeting, and the resignation being accepted, and another chosen into the place of the person who so resigned. If, then, a parel resignation be sufficient, it is clearly not necessary for a party to say "I resign my office," any more than it is necessary in the delivery of a deed, to say, " I deliver." The fact of giving up the office, and accepting another, is quite decisive. It seems to me, therefore, on the whole, quite impossible for the defendant to avail himself of the votes of Turnock and Knight as capital burgesses, and consequently, that he had not a

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(a) Salk. 485.

sufficient number of votes to entitle him to his election.

RIGHT, on the several demises of J. SHORTBRIDGE the younger, and JANE, his Wife, and ELIZABETH CRE-BER, v. JAMES CREBER.

EJECTMENT to recover the possession of certain lands and messuages, situate in the parish of Buckland Monachorum, in the county of Devon. At the trial before Littledale, J., at the Devonshire summer assizes, 1825, the plaintiff obtained a verdict, subject to the opinion of

the Court, upon the following case. Richard Northmore, of Sheepstor, in the county of Devon, being seised in fee of the premises in question, by his last will and testament, bearing date 23rd of June, ever." When 1764, and duly executed and attested for the passing of real estates of inheritance, devised as follows:--" I give J. C., had one and bequeath unto my said wife, M. Northmore, and Elizabeth Northmore, all that my messuage and tenement called Sowton, being in the parish of Buckland Monachorum, in the said county, and the reversion and reversions, remainder and remainders thereof, to hold to them, their heirs and assigns, in trust, to permit and saffer my said wife, M. Northmore, to inhabit, dwell in, use, occupy and enjoy, the parlour and chamber over the south side of the dwelling-house, on the said premises, until the determination of the term which J. Foot now hath of and in the tenement of Coombe Hill, without paying any rent or other consideration therefore; and to permit and suffer my daughter Joan, now the wife of Jacob Creber, and here. assigns, from and immediately after my death, to held: and enjoy, and to receive and take the rents, issues and profits, of all and every of the said premises, except as aforesaid, to her and their own use and benefit, for and during the term of her natural life, free and clear of and from her said husband Jacob Creber, and so that he may not intermeddle therewith, and that the same may not be subject or liable to the payment of any of his debts; and

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Devise of lands to testator's daughter, J. C., for life, " and from and after her death unto the beirs of the body of the said J. C., share and share alike. their heirs and assigns for testator died, bis daughter, child living, and she afterwards had eleven others: -Held, first, that the words heirs of the body in the devise meant children: and. second, that a remainder in fee vested in the child of J. C., living when testator died, subject to open and let in all her other children, successively, as they came into esse.

from and after her death, then I give, devise, and bequeath the same, and every part thereof, unto the heirs of the body of the said Joan Creber, share and share alike, their heirs and assigns, for ever." The testator died, so seised, in January, 1766, without altering or revoking his will, leaving the said Jacob Creber, and Joan his wife, him surviving. Joan Creber, at the death of the testator, had one child, Richard. She subsequently had eleven other children, and died in 1811. The first five, the seventh, tenth, and eleventh, died in her lifetime, intestate, and without issue. Mary, the sixth, and Henry, the ninth, are represented by the defendant James Creber, who was the twelth and last child, their interest having been duly conveyed to him. Both survived their mother, Joan Creber. William, the eighth, died in 1800, but he left two daughters, now living, who are the lessors of the plaintiff. Henry was the eldest surviving son at his mother's death, but William was his elder brother, and represented by his daughters. The said Jacob Creber, the father, the husband of Joan Creber, the devisee named in the will, died in April, 1806, and upon his death the said Joan Creber, his wife, went and lived upon the said premises called Souton. with her son James Creber, the defendant, who rented the same of her, at 321. per annum, from thence to the time of her death, which happened on the 23rd of December, 1811, and has ever since remained in possession thereof.

R. Bayly, for the lessors of the plaintiff. It cannot, certainly, be contended on the part of the lessors of the plaintiff, that the life estate of Joan Creber, which was a more equitable estate, and the legal estate which was vested in the heirs of her body by the subsequent devise, coalesced; the authorities against such a proposition being too clear for argument. Shapland v. Smith (a), Fearne, 52. But the lessors of the plaintiff are, nevertheless, entitled, because they are the two daughters of the eldest son of

(a) Bro. Ch. Ca. 75.

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Joan Creber; they satisfy the description of heirs of her body at the time of her death; Newcomen v. Barkham (a), Harris v. Barnes (b); they take, therefore, by purchase, contingent remainders; and in so taking, they comply with the stipulation of taking share and share alike, because, but for these words, they would have taken jointly, therefore they are entitled to the whole estate. It will be argued, on the other side, that the words " heirs of the body" are not to be construed thus strictly, but must in this instance be taken to mean children. But, assuming that argument to be correct, the lessors of the plaintiff must still recover, for even then they will be entitled to nine-twelfths of the estate, as grand-children, which will be included in the term children: because, in that view of the case, Richard, the eldest son of Joan Creber, took a vested remainder upon the death of the testator, subject to open and admit children subsequently born. Baldwin v. Karver (c), Doe v. Perryn (d), Meredith v. Meredith (e), Gretton v. Haward (f).

Coleridge, contrà. First, the lessors of the plaintiff are not entitled at all, for the devise being to the heirs of the body of Joan Creber, share and share alike, their heirs and assigns, created a joint tenancy or a tenancy in comman: second, at most they are entitled only to one-fourth, because the remainder was contingent upon the death of Joan Creber, and did not vest until that death took place. This will must be construed with reference to the particular facts of the case, and according to the general rules of law, taking care, at the same time, that no violence is done to the testator's real intent. What are the facts of the case? Joan Creber, the tenant for life, had only one child, Richard, living at the death of the testator. She sub-

<sup>(</sup>a) 2 Vern. 729.

<sup>(</sup>b) 4 Burr. 2157. Ambl. 666.

<sup>1</sup> Bl. Rep. 643.

<sup>(</sup>c) Cowp. 309.

<sup>(</sup>d) 3 T. R. 484.

<sup>(</sup>e) 10 East, 505.

<sup>(</sup>f) 6 Taunt. 94.

sequently had eleven others, eight of whom died before her, intestate, and without issue. Of the four survivors, the lessors of the plaintiff represent one, and the defendant is one, and represents the other two. What are the words of the devise? "To the heirs of the body of Joan Creber, share and share alike, their heirs and assigns, for ever." Then, first, those words were clearly intended in fact, and as clearly operate in law, to create not a tenancy in severalty, but a joint tenancy or tenancy in common; for, otherwise, the words themselves will become wholly inoperative, and must be rejected, for which there is no reason. The first estate created, being only a tenancy for life, the children, being purchasers, may take either jointly or in common; and that equally whenever the remainder vested, whether it vested on the death of the testator or at the death of Joan Creber only: for, in either case the remainder would open to admit the children subsequently born, either as joint tenants or tenants in common. Upon this part of the case Doe v. Perryn (a) is in point, for it was there held, that if an estate be devised to B., the wife of A., for life, remainder to the children of A. and B. and their heirs for ever, to be divided equally among them; and if but one child, to such only child and his or her heirs for ever; and at the death of the devisor A. and B. have no child, the estate limited to their children is a contingent remainder in fee, which on the birth of a child will vest in that child, [subject to open and let in those who may be born afterwards. Secondly, the remainder here did not vest at the death of the testator, but only at the death of Joan Creber, the tenant for life. is, " from and after her death, to the heirs of her body," preceded by a devise of the legal estate to trustees in fee. Now, nemo est hæres viventis, therefore, there could be no heirs of the body of Joan Creber during her life. Strictly speaking, the only heir of her body after her death would be Richard the eldest son; but the term heirs of

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her body, here, must be taken in a qualified sense, and it is sufficient to shew that there is a class of persons satisfying the term in its qualified sense, as was held in Heny v. Purcell (a), with respect to the expression "all the children living at her death." There are only two periods that can be looked to, the death of the testator and the death of the tenant for life. It is quite clear that the latter was the period contemplated by the testator; the maxim, nemo est hæres viventis, shews that the former cannot be the proper period; and Russell v. Long (b) is an authority for saying that such a construction ought never to be adopted when any other can be found. [Bayley, J., If the words of a will leave it doubtful whether a remainder is a vested or a contingent one, the law always construes There are many decisive authorities to it as vested. that point]. The rule of law undoubtedly is so; but in most of the cases where the remainder has been held to vest in the lifetime of the ancestor, there have been words in the will denoting that the testator used the word "beir" in its popular sense, as designating the person who was, when the will was made, the heir apparent, or presumptive, of a particular individual. Thus, in Burchett v. Durdant (c), "the devise was to H., in trust for R. D., and after his death to the heirs male of his body, now living. The principal question was, whether the devise to the heirs of the body of R. D. now living, was a vested or a contingent remainder. It was contended, that a man cannot take as kin during the life of his ancestor, for nemo est hæres viventis; but it was resolved that it was a vested remainder, for being limited to the heirs of the body of R. D. now living, it was a sufficient designatio persons, and the same as if he had said heir apparent. But that decision went upon the ground of the introduction of the words now living (d)." Many similar cases might be

(b) 4 Ves. 551.

<sup>(</sup>a) 2 Bl. Rep. 1002.

<sup>(</sup>d) Per Littledale, J., in Doe v. Perratt, Ante, vol. vii., 743.

<sup>(</sup>c) 2 Vent. 311, 313. Carth. 154.

cited, but it is sufficient to refer to them as collected in Fearne, 212. In Gretton v. Haward (a), the testator devised to his wife, and after her decease to the heirs of her body, share and share alike, if more than one, and in default of issue by him, to her absolutely. It was, certainly, held there, that the wife took an estate for life, with remainder to all her children by the testator, as tenants in common, in fee; but there the testator left all the children living at the time of his death; and as he had directed the estate to be divided, it was impossible to suppose that he intended to disinherit any of them that might die before his widow. That case, therefore, does not apply to the present; nor does that of Edwards v. Symons (b), for there the word used by the testator was not heirs, but children. Then, as the general rule is, that children shall not take as heirs in the lifetime of the ancestor, and there are no particular words in the devise to take the case out of the general rule, and to bring it within the exception; it follows, that the remainder here did not vest until the death of Joan Creber, the tenant for life, and that the lessors of the plaintiff are, in consequence, entitled to one-fourth of the estate only.

BAYLEY, J.—I am of opinion that the lessors of the plaintiff are not entitled to recover the whole, but that they are entitled to recover nine-twelfths of the estate in question. It has been argued that they are entitled to recover the whole, upon the ground that the words "heirs of the body," in the will, were used by the testator, and must be construed by us in their strict legal sense; and that, as such, they apply exclusively to the lessors of the plaintiff, who, as the representatives of *Richard*, the eldest son of *Joan Creber*, are the only persons who satisfy that description. If those words stood alone, and there were no other words in the will to shew that the testator used them in a different and qualified sense, the argument

(a) 6 Taunt. 94.

(b) 6 Taunt. 213.

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would have great weight; but there are such other words, namely, "share and share alike," which shew clearly that the testator did not intend the estate to go to the eldest son only, which he must have intended if he had used the words "heirs of the body," in their strict legal sense. Then it has been suggested, that the words " heirs of the body, share and share alike," taken altogether, may be satisfied by supposing that the testator comtemplated that very remote circumstance which has in fact happened, namely, that the eldest son should leave two daughters, who would then be "heirs of the body" of Joan Creber, and might take the estate "share and share alike." I cannot, however, bring my mind to suppose that the testator really contemplated the occurrence of an event so extremely improbable; and then, being satisfied that the words "heirs of the body" were not used in their strict legal sense, our first duty is to inquire in what sense they were used. I am of opinion that they were used in the sense ordinarily given to the word children or issue, as comprehending descendants generally. Then, if the testator used the words heirs of the body in the sense ordinarily given to the word children or issue, all the legal consequences which would have followed if he had actually used either of those words, must follow in this case; and one of those, according to the decision in Doe v. Perryn (a) is, that the estate limited to the children was a contingent remainder in fee, which vested in each child at the moment of its birth, subject to open and let in the other children which were born afterwards. It is a settled rule of law, that whenever a remainder can be construed to be a vested remainder, it shall be so construed, and shall operate not as a contingent but as a vested remainder, and for this sound reason, that if a remainder is contingent, it is liable to be defeated altogether by the destruction of the previous estate; as, in this case, if the remainder was contingent during the life of Joan Creber, the trustees might have

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defeated it by destroying their own previous estate, and the childrens' interest under the will would then have been destroyed altogether. For that reason, I am of opinion that the remainder vested, immediately upon the death of the testator, in Richard, the eldest child of Joan Creber; that it opened upon the birth of each subsequent child successively, who immediately took a vested remainder in its share: and that eight of these children having died intestate and without issue, their shares vested in the lessors of the plaintiff, as the legal representatives of the eldest brother. The cases that have been cited as illustrative of the maxim, nemo est hæres viventis, are not applicable to the present case, because in them there was nothing to shew that the testator used the words "heirs of the body" in any other than their strict legal sense. Wherever it can be collected, from the language of the will, that the testator has used those words in a different or qualified sense, as a designatio personæ, there the remainder vests, notwithstanding the general rule, nemo est hæres viventis; Burchett v. Durdant (a), Long v. Beaumond (b), Goodright v. White (c). In this case I think it may be collected from the language of the will, that the testator intended to use, and did in fact use, the words heirs of the body in the sense as children, and, consequently, meant that the remainder should vest in the eldest child, subject to open and let in the other children as they should be born. That being the testator's intention, we are bound to give it effect, and the result of so doing is, that the lessors of the plaintiff are entitled to recover nine-twelfths of the estate in question, and no more.

HOLROYD, J.—I am also of opinion that the lessors of the plaintiff are entitled to recover to the extent of ninetwelfths of the estate. If the words "heirs of the body"

<sup>(</sup>a) 2 Vent. 311, 313. Carth.

<sup>(</sup>b) 1 P. Wms. 229.

<sup>154.</sup> 

<sup>(</sup>c) 2 Bl, R. 1010.

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are to be construed strictly, the remainder was contingent until the death of Joan Creber. If they are to be construed as "children," the maxim, nemo est hæres vivcatis. does not apply, because then the will must be construed as if the testator had actually used the word children in the devise, instead of the words heirs of the body. find any thing in the will to justify the belief that the testator meant such children only as were living at the death of Joan Creber; on the contrary, he seems to me clearly to have meant all the children as they should from time to time come into esse. The expressions "share and share alike," and "their heirs and assigns," plainly indicate that he did not use the words "heirs of the body" in their strict legal sense. Upon the authority of Gretton v. Haward (a), which is a case extremely similar to the present, I think those words must be taken to mean "children," and if so, a remainder vested in Richard the eldest child, upon the death of the testator, which was devested, pro tanto, upon the birth of every succeeding child.

LITTLEDALE, J., concurred.

Judgment for the plaintiff.

(a) 6 Taunt. 94.

The King v. The Inhabitants of Upper Boddington.

On a question of settlement, a mortgagee, a rated inhabitant of the appellant parish, subpænaed by the responnot compella-

TWO Justices, by their order, removed Ann Leigh, widow of Joseph Leigh, and their three children, from the parish of Upper Boddington, to the parish of Staverton, both in the county of Northampton; and the sessions, on appeal, quashed the order, subject to the opinion of this Court dent parish, is upon the following case:

ble under a subpoena duces tecum, to produce the title deeds of his mortgagor: nor can his aftorney be allowed to produce an abstract of the deeds, or to give parol evidence of their contents.

Joseph Leigh, the pauper, Ann's late husband, was the son of George and Isabella Leigh, who for many years after the year 1776, resided in a house in the appellant Notice had been given on the part of the re- INHABITANTS spondent parish, to a Mr. Thomas Hands, to the parish officers, and to their attorney, and a subpæna duces tecum Boddington. served on Mr. Thomas Hands, to produce at the trial all and every the deeds, papers and writings, relating to a certain messuage, cottage, or tenement, and premises, situate and being in Staverton aforesaid, heretofore the property of, and belonging to George Leigh, and Isabella his wife, or one of them, late of Joseph Leigh, deceased, and now of Richard and George Leigh, and lately on mortgage to the representatives of Mr. John Liddall, deceased, and particularly certain indentures of lease and release, bearing date respectively the 8th and 9th April, 1776, the release being tripartite, and made between Elizabeth Isham, of Wilscott, in the county of Oxford, spinster, second daughter and devisee of the last will and testament of William Isham, late of Staverton, in the county of Northampton, weaver, deceased, of the first part; the said George Leigh and Isabella his wife, and the said Joseph Leigh, therein described as the only son and heir apparent of the said George Leigh, by the said Isabella his wife, of the second part; and John Leigh, of Upper Boddington, aforesaid, weaver, and Henry Burditt, of Staverton, aforesaid, shoemaker, of the third part; which deeds, it was contended, would, when produced, prove a conveyance of the said house to the said George Leigh. The deeds of lease and release of 8th and 9th April, 1776, were, before the removal of the pauper, in the hands of Mrs. Ann Marriott, as a mortgagee; at which time an abstract of them was made by a clerk of her solicitor, by the solicitor's direction. Afterwards these deeds came into the possession of Mr. Thomas Hands, as assignee of the said mortgage. Mr. Hands appeared in Court, in compliance with the subpæna, with a parcel of deeds, but objected to produce 3 в

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the one in question, as it formed one of the title deeds of his property, and the Court held, that he was not bound to produce it. The respondents then called the clerk who made the abstract. He proved, that the deed from which the abstract was made, consisted of a lease and release, though he did not particularly notice with what stamp; and appeared to have been duly executed. The respondents then tendered the abstract as secondary evidence of the contents of the deed, or offered to give parol evidence of its contents by the clerk. To this evidence the appellants objected, and the Court refused to receive it, and quashed the order of removal.

Humfrey and Burton, in support of the order of sessions. The evidence offered on the part of the respondents was properly rejected. No man is bound, by his duty as a witness, to produce documents, the publication of which may compromise his own rights; therefore, though in obedience to the writ of subpæna duces tecum, Mr. Hands properly brought his title deeds into Court, he with equal propriety refused to submit them to public examination. The writ is binding upon the party to bring the document into Court; but when he has done so, he may object to produce it; and the validity of his objection is to be decided by the Court before which he appears. The law, as bearing upon this point, was very fully discussed in the case of Amey v. Long (a), where Lord Ellenborough, in delivering the judgment of the Court, said "it was, in every instance, a question for the consideration of the Judge at Nisi Prius, whether, upon principles of reason and equity, the production should be required." as the Court below have exercised their discretion upon a question of this sort, it may at least be doubted, whether this Court has jurisdiction to inquire if that discretion has been exercised properly or not, and whether the decision of sessions is not conclusive of the question.

[Bayley, J. In the present case, at all events, we have clearly jurisdiction to inquire into the propriety of the decision of the sessions, for they have expressly submitted that question to our consideration]. Then their decision INHABITANTS was clearly correct in point of law; for reason and equity, upon which all law is founded, forbid that either of two Boddington. contending parties should be at liberty to compel a third party to produce his title deeds, and thereby place his property in danger. On a question of settlement, a rated parishioner is not compellable by the adverse parish to give evidence, as he is directly interested as a party to the appeal, and does not come within the words or meaning of the statute 46 Geo. 3, c. 37, which is declaratory of the law with respect to witnesses refusing to answer. Woburn (a), Rex v. Hardwick (b). A witness is privileged from answering any question, the answer to which might subject him to a forfeiture of his estate; and it is an established principle in courts of equity, that a party is not bound to answer so as to subject himself to any forfeiture of interest (c). This proposition is expressly supported by the case of Lambert v. Rogers (d). the plaintiff and defendant were tenants in common, and the plaintiff moved for the production of a deed, alleged to be in the possession of the defendant. It appeared by the answer filed by the defendant to the plaintiff's bill, that the defendant had sold his share of the property, and was in possession of the deed in question, merely as mortgagee to the purchaser. The Lord Chancellor, upon that ground, refused the motion, observing, that it would afford a dangerous precedent to the security of property, if he were to grant it; and that the case of the defendant, being then in the character, not of a tenant in common, but of a mortgagee, made a most material difference. direct authority for saying, that Mr. Hands, the mortgagee

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<sup>(</sup>a) 10 East, 395. (c) Phil. Ev. 3d Ed. 225, 6. (b) 11 East, 579. See 1 M. & (d) 2 Meriv. 489. S. 636.

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in this case, was not bound to produce the deeds required of him; and if so, it follows, that neither his attorney, nor that attorney's clerk, could be allowed to give parol evidence of the contents of the deeds. Their knowledge of those contents was obtained in the course of their professional employment, under the confidence of professional secresy, and was, therefore, in the nature of a privileged communication, which they were neither bound by law, nor would have been free in point of honour, to divulge. *Phillipps on Evidence*, 3 Ed. 108; and the cases there collected.

Dwarris, contrà. The production of the deeds, in the possession of Mr. Hands, ought to have been enforced; but if not, at least parol evidence of their contents ought to have been admitted. Mr. Hands was a rated inhabitant of the appellant parish, and so far a party to the suit; he was, nevertheless, a competent witness, by the provisions of the statutes 27 Geo. 3, c. 29, and 54 Geo. 3, c. 107: the latter of which was passed subsequently to the passing of the 46 Geo. 3, c. 37, and to the decision of the cases of Rex v. Woburn (a), and Rex v. Hardwick (b). There was nothing to shew that, by producing the deeds of lease and release, Mr. Hands would have incurred any risk of a forfeiture of his estate, which was the only ground upon which he could relieve himself from the duty of giving evidence imposed upon him by the 46 Geo. 3, c. 37; and as his withholding his evidence was working a hardship to the respondent parish, and a benefit to the appellant parish and himself, it seems hardly consistent with justice, or with the intention of the legislature, that he should be excused from giving evidence under such circumstances. But, at all events, the abstract of the deeds, and the parol evidence of their contents, ought to have been received. The respondents had done every thing that it was possible for them to do, towards

<sup>(</sup>a) 10 East, 395.

<sup>(</sup>b) 11 East, 579.

obtaining the best evidence—the deeds themselves; and under such circumstances, where no laches were imputable to them, sufficient was done to justify the letting in the secondary evidence. It is said, that both the abstract and the parol evidence of the attorney and his clerk, as to the contents of the deeds, were in the nature of confidential communications between attorney and client, and therefore, not to be revealed; but the proposition cannot be supported. "This privilege of the client," it is said, " is confined to such communications as are made with reference to professional business during the relation of attorney and client" (a): and it seems that such communications only are privileged as are made in contemplation, or in furtherance of a suit; Cobden v. Kendrick (b), where Lord Kenyon said, "the communication was not here made in contemplation of a suit." In Copeland v. Watts (c), Gibbs, C. J., ordered a deed to be read, which was in the possession of the attorney of a third person, where it appeared to him, on perusal, that the third person's interest could not be effected, or, at least, only In Studdy v. Saunders (d), it was held that, in an action against the defendants as partners, the office copy of an answer to a bill in Chancery, filed by one against the other, was admissible evidence, without producing the original, in order to establish the partnership; and that to prove the identity of the defendants, the clerk of the solicitor was a competent witness to that fact, though he knew nothing of the defendants, but from his intercourse with them professionally, in the conduct of the suit in Chancery. Now, here, the attorney, who prepared the abstract, and whom it was proposed to examine, was not the attorney of Mr. Hands, to whom the deed belonged, nor did the relation of attorney and client appear ever to have existed between them; for the case expressly finds that the abstract was made by the attorney of Mrs. Marriott, at the time when the deeds were in her hands.

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<sup>(</sup>a) Phil. Ev., 3rd Ed., 108.

<sup>(</sup>c) 1 Stark. R. 95.

<sup>(</sup>b) 4 T. R. 432.

<sup>(</sup>d) Ante, vol. ii. 347.

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BAYLEY, J.—I am clearly of opinion, that the decision of sessions was right upon both points, and that their order, therefore, must be confirmed. Hands was a party to the appeal, and, as such, was not compellable by the adverse parish, by whom he was called, to give evidence at all. He was also interested as a mortgagee in the deeds; and as their production might, by possibility, have put his interest in jeopardy, he was justified in refusing to produce them. The deeds themselves not being produced, secondary evidence of their contents was certainly admissible; but then that secondary evidence must have been of an unexceptionable nature in point of law. Was the secondary evidence, offered in this case, of such a nature? Clearly not. The abstract was made by the attorney of a former mortgagee of the premises of which the deeds constituted the title, and those deeds had come into Mr. Hands' possession, as the assignee of that mortgagee. It was, therefore, an abstract made by an attorney, for the purposes, eventually, of Mr. Hands; and as it remained in that attorney's possession after Mr. Hands became the mortgagee, must be taken to have been deposited there by him, and for his use and benefit, and the attorney was not at liberty to produce it. If so, it follows that the attorney could not be at liberty to give evidence of the contents, either of the deeds or the abstract, because the whole of those contents were a confidential communication between a client and his attorney, and therefore privileged from disclosure; and as to the attorney's clerk, he stood precisely in the same situation as his master. I think it would be opening a door to great abuse of the confidence necessarily reposed by the client in his legal adviser, if we were to hold such evidence as this admissible.

The other Judges concurred.

Order of sessions confirmed.

The King v. The Justices of Somersetshire.

THIS was a rule nisi for quashing an order of justices at petty sessions, for the allowance of the accounts of the ty sessions surveyor of highways for the parish of Churchill, in the county of Somerset, and which had been removed into this accounts of a Court by certiorari, pursuant to a rule of Trinity term, 1825 (a). The affidavit on which the rule was obtained stated, that the accounts were produced at a vestry meeting held on the 24th September, 1824, when the surveyor was directed to lay them before the Rev. Mr. Wilde, the strate, pursunearest resident magistrate; which he promised to do; but instead of so doing, he laid them before the justices at Act, 13 G. 3, petty sessions on the 4th October following, who made the Held, that they order in question for allowing them. The return to the certiorari merely set out the order, which was dated the the whole pro-4th October, 1824, and purported to be signed by two magistrates.

Adam shewed cause. The objection raised to the order is founded upon the General Highway Act, 13 Geo. 3, c. 78, s. 48, which, it is contended, makes it imperative on the surveyor to lay his accounts before a single magistrate for examination, previous to their allowance by the magistrates at petty sessions. The objection, however, is not tenable. The mode pointed out by that clause of the statute, is mere matter of form, and the clause itself must be regarded as merely directory. It has always been considered as perfectly immaterial, whether the accounts were laid before one magistrate, and afterwards taken to the petty sessions; or whether they were taken to the petty sessions at once: and properly so; for there is no appeal to the quarter sessions in either case; Rex v. The Justices of the West Riding of Yorkshire (b), Rex v. Mitchell (c); in the former of which cases, Buller, J., said that the (b) 5 T. R. 629. (c) 5 T. R. 701. (a) Vide ante, vol. vi., 469.

Where the justices at petmade an order allowing the surveyor of highways, which accounts had not previously been verified before a single magisant to the General Highway had no jurisdiction; that ceeding was coram non judicia; and that the order must be quashed.

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justices at petty sessions had the same power over the surveyor's accounts as any one justice had. [Bayley, J. If the accounts are allowed by one justice, have the justices at petty sessions any jurisdiction 'at all over them?] In that case they clearly have not. [Bayley, J. Then they have jurisdiction only over those items which are disallowed by one justice; but if the accounts are never laid before one justice, he can never disallow any of the items, and the jurisdiction of the justices in petty sessions can never begin].

## Campbell, contrà, was stopped by the Court, and

Per Curiam.—It is quite clear that the justices at petty sessions have no original jurisdiction over the surveyor's accounts; they are only to examine into such items as have been disallowed by a single magistrate. The accounts, therefore, must, both by the express words of the statute, and by the reason and necessity of the thing, be first laid before a single magistrate. Here they were in the first instance taken to the justices at the petty sessions, who made an order for their allowance, which they had no authority to do. The whole proceeding, consequently, was coram non judice, the order of justices was bad, and the rule for quashing it must be made absolute.

Rule absolute.

The King v. The Inhabitants of Bilston.

An engine erected and used by the owner and occupier of

UPON an appeal against a rate made for the relief of the poor of the township of *Bilston*, in the county of *Stafford*, wherein the appellants were rated for a steam

an ironstone mine, solely for the purpose of drawing water from the mine, is parcel of the mine itself, and not rateable to the poor. engine and engine pit, the sessions amended the rate by striking out the item, subject to the opinion of this Court upon the following case.

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The engine, and engine pit, are erected, sunk, and used by the appellants, solely for the purpose of drawing water from ironstone mines in their occupation. Nothing is raised from these mines, except ironstone.

O. Russell and Shutt, in support of the order of ses-It is clear that the ironstone mines themselves are not rateable; neither are the engine and the pit. case does not find that any profit is derived from the mines, even if that circumstance could make the engine and the pit rateable; nor even that they might become profitable if they were let to a tenant. In all the cases in which engines or machines have been held rateable, they have been annexed to a house, or to land, or to something which was itself rateable; as in the case of the weighing machine, Rex v. St. Nicholas, Gloucester (a), and the carding machine, Rex v. Hogg (b). Here, the engine is a mere adjunct, or appendage to mines which are not in themselves the subject of rate. The engine here, being used solely for the purpose of draining the mines, is a positive charge and expense; a drawback upon the profit of the mines; and, therefore, if the profits of the mines were rateable, the expenses of the engine would be the subject of deduction; 1 Nolan, 226. ther does the pit produce any profit; for, on the contrary, expense is incurred in sinking it, and to rate the pit, therefore, would be really and literally to rate sunk capital; 1 Nolan, 150. If the engine and the pit, which are of use only for the purpose of raising to the surface that which is not rateable, may be rated, why may not the subterranean works, the machinery and the rail-roads, used for the purposes of the mines, be rated also? To rate the engine and the pit, would be in effect to rate the The King
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mines themselves, which have been always held, in point of law, exempt from rateability. The only profit realised, arises from the ore that is raised, and the only mode in which this rate could be paid, would be from the sale of the ore; and yet the ore itself is not rateable, Atkins v. Davis (a).

D. F. Jones, and Whateley, contrà. It must be conceded, that the mine itself is not rateable, nor is it contended that the engine and the pit are rateable as adjuncts to the mines, or as personal property. But the engine is affixed to the land upon the surface, and not in the mine; it is an adjunct to the land, enhancing the value of the land, and therefore rateable as parcel of the freehold. The property on the surface, and the property in the mine, may be vested in different parties; in that case the surface would undoubtedly be rateable for the increased value produced by the engine: and the mere circumstance of both being occupied by the same individual, cannot discharge the land, quà land, if it is properly the subject of rate. Suppose the engine belonged to the owner of the surface, who let it to the owner of the mine, could it be contended that it was not rateable? Clearly not; and yet there is no actual difference in the case, whether the owner of the mine erects the engine himself, or hires it of some other person. In the case of a coal mine, the particular use to which the produce is applied, by the owner of the lands, does not exempt it from rate. Thus, if the coal is used for smelting the ore of his own iron mine, the coal is rateable, though the ore is not. For, there is no difference whether it is thus applied by the owner, or sold by him to another, who uses it in an iron foundry. Rex v. Cunningham (b). Every thing which is an adjunct to land, and enhances the value of the land, is rateable, Rex v. Hogg(c); where it was held that a carding engine, used to carry on part of the process of a cotton manufactory, increased the value

<sup>(</sup>a) Cald. 333.

<sup>(</sup>b) 5 East, 478.

<sup>(</sup>c) 1 T. R. 721.

of the land, and was rateable as an adjunct; and Rex v. Bell (a), where it was held that the occupier of land, over which a way-leave, or waggon-way was erected, for the purpose of carrying coals from his mine, was rateable for the value of the waggon-way; and yet, in both those cases, the thing rated would not be a benefit, but on the contrary, a burthen, to the occupier, except for its connexion with the mine. So here, the engine is an adjunct to the land, and as such is rateable; it is also in effect a profit to the mine, and not a burthen upon it, for without the engine, the mine itself could not be made profitable.

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BAYLEY, J.—I entertain no doubt at all in this case; it seems to me too plain for argument: and I am clearly of opinion, that the sessions came to the right conclusion. In the cases of the carding engine and the weighing machine, they were each considered as fixed to the building, forming part and parcel of it, and increasing its value; and were held rateable accordingly. So, in the case of the canteen, the privilege of selling liquors was considered as annexed to the house, and as forming part of its value. But here, the owner of a mine which he works in his own land, erects an engine for the purpose of working the mine, and which is of no use to him for any other purpose whatever. The mine itself is not within the statute of Elizabeth, and not liable to be rated: then is the engine part and parcel of the mine; for if it is, that is not liable to be rated either. Try the question by analogous cases. In many of these mines, there are railways under ground, used for the purpose of conveying the ore from one spot to another. They very much increase the value of the mine, and, as a necessary consequence, of the land also; but yet they are not rateable. The same principle applies The engine must be regarded in the same character as the railway. The one is used to draw the water from the mine; the other to convey the coal to the mouth of CASES IN THE KING'S BENCH,

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the shaft; both are useful for the purposes of the mine, but for no other purpose; and both, so far, enhance the value of the mine, and of the land: but neither of them is the subject of the rate. Suppose this mine had been demised by lease, together with the machinery; there can be no doubt that the engine would have passed with the mine, to the lessee: it must, therefore, be considered as part and parcel of the mine, and is, like the mine, exempt from poor rate.

HOLROYD, J.—I am also of opinion that the sessions were right. The engine was a matter of burthen, not of profit, except as regarded its connexion with the mine. To the mine it was not only useful, but necessary; it was not merely an adjunct to it, but actually part and parcel of it. As regarded the land, independently of the mine, the engine was altogether burthensome. Then, as the profits of the mine are exempt from poor rates under the statute of 43 Eliz. c. 2, it follows that the engine, as part of the mine, must be exempt also.

LITTLEDALE, J.—I am entirely of the same opinion.

Order of sessions confirmed.

DOE, on the demise of the EARL of DARLINGTON, v. BOND and others.

Proviso in a lease, "that if lessee committed waste, to the amount of 10s., lessor might re-enTHIS was an action of ejectment to recover the possession of a dwelling-house and premises, situate in the borough of *Camelford*, in the county of *Cornwall*. Plea, not guilty, and issue thereon. At the trial, before *Gaselee*, J.,

ter." Lessee pulled down buildings, worth 10l., and substituted others of a different nature. In ejectment for a forfeiture:—Held, that "waste" in the proviso meant such waste as must produce an injury to the reversion; and that it should have been left to the jury, in express terms, whether such waste, to the amount of 10s., had been committed.

at the last Spring assizes for Cornwall, the facts of the case appeared to be these. In 1805, the premises in question were demised to one Abel Uglow, by the trustees under the will of Sir W. Molesworth, for 99 years, determinable on three lives, still in being. In 1819, the lessor of the plaintiff became assignee of the reversion; and in 1823, the Marquis of Hertford, under whom the defendants held, became assignee of the lease. The lease contained a proviso, "that if the lessee, his executors, administrators or assigns, should commit, or permit, any manner of waste in or upon the demised premises, to the value of 10s., and the same did not amend, or other satisfaction for the same give, within three months after notice, the lessor might re-enter." At the time of the demise, the premises consisted of two tenements, a bullock-house, and a garden. In October, 1824, the Marquis of Hertford converted the two tenements into five, pulled down the bullock-house, the materials of which were worth 101., and upon the site of it erected three other tenements. Before the three new tenements were completed, the lessor of the plaintiff sunk a shaft, and dug an adit under the . premises, and by an explosion of gunpowder, entirely destroyed the new buildings. On the 10th of October, 1825, a notice was served upon the defendants and the Marquis of Hertford, calling upon them, within three months, to put the premises into the same state which they were in at the date of the lease, and to repair all waste committed; and nothing being done in pursuance of the notice, the present action was brought. The question, whether waste to the amount of 10s. had been committed, was not expressly left to the jury, but they found a verdict generally for the plaintiff. They also found that, though the bullock-house might have been restored within three months from the date of the notice, no prudent man would have rebuilt it; and, in answer to a question put to them, they found that the lessor of the plaintiff had not acquiesced in any of the alterations complained of.

Doe v. Bond. Doe v. Bond. C. F. Williams, in Easter term last, obtained a rule nisi for a new trial, against which

Carter now shewed cause. It was not necessary to leave to the jury, in express terms, the question, whether waste to the amount of 10s. had been committed. The fact that waste to a far greater amount had been committed, was clear upon all the evidence; and the jury, in their general verdict for the plaintiff, must have intended, and must be presumed, to have found that particular fact; for they could have had no other ground for finding such a verdict at all. The removal of the bullock-house was clearly waste, and as the materials of it were proved to be worth 101., it was impossible to doubt that the removal of such a building was waste to the amount of 10s. bullock-house had been removed for the purpose of rebuilding it, and it had been rebuilt accordingly, that could not have been called waste; but, here, a totally different building was substituted for it: and the act of erecting that building could not vary the nature of the previous act of waste, nor could the value of it, however superior, be set against the value of the waste done. The mere alteration of a building is an act of waste, for the lessor has a right to insist that the buildings on the demised premises shall be continued of the same character as they were at the time of the demise; and it may often be important to him that they should, as a mode of preserving their identity upon any question of title. The act of removing the bullock-house was waste at common law; and was clearly waste, within the meaning of the proviso in the lease, so as to entitle the lessor to re-enter.

C. F. Williams, Manning and Coleridge, contra, were stopped by the Court.

BAYLEY, J.—In a case like this, where the object of the action is to work the forfeiture of a lease, the question TRINITY TERM, SEVENTH GEO. IV.

ought to have been left to the jury, in the precise language of the lease, "was this waste committed to the amount of 10s.?" The specification of the amount in the proviso clearly shews that the waste intended to be prevented was such as would injure or deteriorate the value of the property, and the meaning of it seems to me to be, that if waste is done, producing an injury to the reversion to the value of 10s., and the same is not amended, or satisfaction made for it within three months after notice, the lessor shall be at liberty to re-enter. Arguments might be addressed to the jury, by both parties, on that question: by the one, that the value of the reversion had been increased by the alteration; by the other, that it had been diminished; it was, therefore, properly, a question for the jury, whether waste had been committed to the amount of 10s., and ought to have been left to them in express terms. That not having been done, I am of opinion that there ought to be a new trial.

HOLROYD, J., and LITTLEDALE, J., concurred.

Rule absolute.

## EARL of SEFTON v. COURT.

FEIGNED issue, under an Inclosure Act of 1822, manor, may, passed for inclosing a certain common, or tract of waste land, called Burlish Common, in the manor and chapelry of Lower Mitton, in the parish of Kidderminster, in the county of Worcester. The declaration averred, that plain- his own matiff was entitled to right of common for sheep, in the right to turn waste lands in the manor of Mitton, in respect of his his own cattle freehold lands in the parish and manor of Kidderminster, monable waste to wit, 115 acres, called Burlish, otherwise Burchin lands of another manor. Coppice Farm, in the occupation of A., and 144 acres, called Blackstone Farm, in the occupation of B.; upon

A lord of a in respect of his right of soil in the commonable waste lands of on the com-

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this the plea took issue. At the trial, before Garrow, B., at the last Worcestershire Lent assizes, the case was this. In 1817, Lord Foley, being seised in fee of the two farms mentioned in the declaration, by deed of lease and release, conveyed all his estates to the plaintiff, in trust, to pay off certain incumbrances. The defendant was the commissioner under the Inclosure Act of 1822. Of the 144 acres, which Blackstone Farm contained, 40 were, previous to 1774, waste land, part of Kidderminster common, and the residue were old inclosures. Of the 115 acres, which Burlish, or Birchin Coppice Farm contained, 62 were, previous to 1795, wood land, and were called Burlish Wood, or Birchin Coppice, and the residue were, previous to 1774, waste land, also part of Kidderminster Common. In 1774, an act was passed, for dividing and inclosing the waste lands in the manor of Kidderminster, and among them Kidderminster Common. That act recited that Mr. Foley, the ancestor of Lord Foley, was lord of the manor of Kidderminster, and was seised in fee, among other things, of a coppice or parcel of wood land, called Burlish, subject to rights of common therein, and enacted, that the commissioners should allot to the lord of the manor, as a compensation for his right to the soil of the said waste lands, one sixteenth part of the waste lands intended to be inclosed; and that out of the said sixteenth part they should allot portions to the persons entitled to right of common upon Burlish Wood. The commissioners, accordingly, allotted to Mr. Foley, as lord of the manor of Kidderminster, among other lands, the two parcels of land containing 40 acres and 53 acres, at present forming parts of Burlish Wood Farm and Blackstone Farm. The tenant of Blackstone Farm had, for a period of 48 years, turned out his sheep, sometimes to the number of 300, upon Burlish Common, and the tenant of Burlish Wood Farm had also, for a period of 22 years, turned out his sheep there, generally to the number of 80. Common was within the manor of Lower Mitton, and was

inclosed under an act passed in 1822. From 1602 to 1813, the lords of the manor of Lower Mitton were, suc- LORD SEFTON cessively, tenants for life only; and from 1813 to 1820, the lord of that manor was an infant. Upon this state of facts, two objections were taken on the part of the defendant. First, that, previous to 1774, the lord of the manor of Kidderminster could not have been entitled to a right of common for his own cattle upon waste lands in the manor of Lower Mitton, in respect of his waste lands in that manor; and that since 1774 such a right could not have been acquired, because the lord had, from time to time, been incapable of conferring it. And, second, that even if the right existed in point of law, still there was no evidence of its existence in point of fact; because the exercise of it might apply to those lands which were inclosed previous to 1774. The learned Judge directed the jury to find their verdict for the plaintiff generally, but gave the defendant leave to move to restrain the verdict to such lands as were inclosed previous to 1774; and to enter a verdict for the defendant as to the residue of Blackstone Farm, and as to the whole of Burlish Wood Farm. A rule nisi having, in Easter term last, been obtained accordingly, cause was now shewn by

Campbell, O. Russell, and Talfourd. The jury have found, as a matter of fact, that the plaintiff was entitled to a right of common, as well in respect of the lands inclosed before 1774, as those inclosed since. The first question, therefore, is, whether, in point of law, such a right could exist with reference to lands which were before 1774 waste lands, subject to rights of common. Now, if such a right can have had a legal origin, the Court will presume its existence; because, as there has been an exercise of it for a period of almost fifty years, they will not presume that exercise to have been, from . time to time, a trespass. Mr. Foley was seised in fee of the old inclosed part of Blackstone Farm before 1774, and 3 с

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he was seised in fee of the soil in the uninclosed part, also, as lord of the manor. Then, when he turned out his own cattle upon the waste of his own manor, he was exercising, not a right of common, but a right of soil; for, where two persons, by virtue of grant, prescription, or custom, take in common with each other from the soil of a third person, a portion of the natural produce of that soil, there a right of common exists; but, where the lord of a manor turns out his own cattle to feed upon his own waste, there he takes the natural produce of his own soil. If Mr. Foley, as lord of the manor of Kidderminster, before he granted to the tenants of that manor a right of common on his waste, had received from the lord of the manor of Lower Mitton a grant of a right of common for his cattle on the waste of that manor; that grant, and the right springing out of it, would not have been destroyed by his afterwards granting, to his own tenants, a right of common on the waste of the manor of Kidderminster. There may be a right of common in respect of uninclosed lands. Corbet's case (a), Cheeseman v. Hardham (b). The second question is, whether there was sufficient evidence to warrant the jury in finding, as a matter of fact, that the plaintiff was entitled to a right of common as well in respect of the lands inclosed before 1774 as those inclosed since. It is submitted that there was; for it was proved that the tenants of both the farms, had turned out their sheep on Burlish Common; the tenant of Blackstone Farm, for a period of 48 years, and to the number of 300 sheep; and the tenant of Burlish Farm, for a period of 22 years, and to the number of 80 sheep.

Jervis and Peake, Serjt., contrà, were stopped by the Court.

BAYLEY, J.—The jury have found that the plaintiff is entitled, in point of fact, to a right of common for sheep

(a) 7 Rep. 65.

(b) 1 B. & A. 706.

on Burlish Common, in respect of all his freehold lands described in the declaration, as well those which were inclosed LORD SEFTON before the year 1774, as those that were down to that time waste, and subject to rights of common. To that finding, it is objected on the part of the defendant, that the plaintiff is not entitled to a right of common in respect of such lands as were originally part of Kidderminster Common, and were allotted to the ancestor of Lord Foley, under the Inclosure Act, for two reasons: first, because no such right could exist in point of law, in respect of waste lands subject to rights of common; and second, because no such right was proved to exist in point of fact. With respect to the first branch of this objection; I think such a right may, by possibility, exist in point of law. I see no solid reason why it should not. I think the lord of the manor may. in respect of his right of soil in the commonable waste lands of that manor, have a right to turn his own cattle upon the commonable waste lands of another manor. lord is seised in fee of the waste of his own manor; and though he may, from time immemorial, have granted to others a right of common on the waste of that manor, still he may, even before that time, have received the grant of a right to turn his own cattle apon the waste of an adjoining manor. It seems to me, therefore, that, in point of law, the lord of this manor may have had a right of common in respect of those lands which in the year 1774 were waste and subject to rights of common. ther he had that right, in point of fact, is a very different question: all the facts and probabilities of the case appear to me strongly opposed to such a state of things; and I feel great difficulty in saying, that there is sufficient evidence to warrant me in presuming that such a right ever did exist in fact. If the lord had claimed the right of turning his cattle upon Burlish Common in respect of the newly inclosed lands, and in respect of those only, the fact of his having turned his cattle on, ever since the year

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1774, would have been strong evidence of his right in respect of those newly inclosed lands; but he claims the right in respect of other lands, as well as the newly inclosed lands. Now, there was no evidence to shew that, before the inclosure, any individual had exercised the right in respect of the allotments; and in the absence of such evidence, it was far too much to presume that the lord, in respect of the waste land of his own manor, had a right of common upon the waste land of another manor. fact of the tenant of Blackstone Farm, having turned on his sheep ever since the year 1774, was no proof that he exercised that right in respect of the allotment; because he possessed the right in respect of other land. distinction between the allotment and the other land ought to have been pointed out to the jury more clearly and fully than it was, and that they should have been directed to observe that there was very slight evidence, if indeed there was any, of any exercise of the right in respect of the latter. With reference to Burlish Coppice, a different consideration arises. Down to the year 1795, that was wood land; and so long as it was wood land it is almost impossible that there could have been cattle levant and couchant upon it. It may, indeed, at some antecedent period, have been waste land, and there may then have been a right of common in respect of it; but there was no evidence of that fact, and unless it was proved to have been made coppice, within the time of legal memory, the presumption certainly was, that there was no right of common in respect of it. For these reasons I am of opinion, that the question of fact, in this case, was not properly left to the jury, and, therefore, that upon that point there ought to be a new trial; unless the plaintiff will consent that the verdict shall be restrained to the right of common as claimed in respect of the old inclosures.

Holroyd, J., and Littledale, J., concurred.

The plaintiff having consented that the verdict should be entered in the terms prayed for by the rule, the Court made the

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Rule absolute.

## The Duke of Somerset v. Fogwell.

TRESPASS, for breaking and entering plaintiff's close, covered with water, called the River Dart, in the parish vigable river, of Berry Pomeroy, in the county of Devon, between a certain place called Hun's Mouth, and a certain place granted by the called Penny's Quay, and taking plaintiff's fish therein. Second count, for breaking and entering the several fishery of plaintiff, in the River Dart. Third count, for corporeal hebreaking and entering the free fishery of plaintiff. Fourth reditament, count, for carrying away and converting plaintiff's fish. Plea, not guilty, and issue thereon. At the trial, before Burrough, J., at the last Spring assizes for the county of Devon, the plaintiff's case was this. By letters patent of 44 Eliz., that queen granted to Edward Seymour, Esq., his heirs and assigns, "all those domain lands and manors of Berry Pomeroy, and Bridge Town Pomeroy, and the castle of Berry Pomeroy, with all their rights, members, liberties, and appurtenances, in the county of Devon, then lately parcels of the lands and possessions of Edward, late Duke of Somerset, and once parcels of the lands, possessions, and hereditaments of T. Pomeroy, knight; together with all waters, fisheries, &c., to the aforesaid manors, castles, and premises, and to each and every of them, belonging or appendant, known, accepted, held, used, or reputed or deemed as part or parcel of the same premises." Two chirographs of fines were then produced, the first in 2 Edw. 6, and the other in 2 & 3 Philip and Mary, both levied by ancestors of the plaintiff, and both being of

A several fishery in a nawhere the tide ebbs and flows, crown to a subject before Magna Charta, is a mere inand a term for years in it cannot be created but by deed.

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the manor of Berry Pomeroy, &c., ac de separali piscaria in aqua de Dert. It was then proved, that the plaintiff, and his ancestors, had ever since the year 1765, regularly received for the fishery, from different tenants, for fishing in the River Dart, between Hun's Mouth and Penny's Quay, an annual rent; that no other persons had ever claimed the right of fishing within those limits; that the River Dart was a navigable river, and that the tide ebbed and flowed over those limits; and that the defendant had committed the trespass complained of, by taking fish within those limits. In answer to this case, the defendant produced a written agreement, not under seal, dated May, 1824, previous to the date of the trespass, whereby the plaintiff agreed to let, and one N. Mills agreed to take, "all his, the said Duke's fishery, of whatsoever nature, kind, or description the same might be, and to which the said Duke, at law, or in equity, was entitled in, upon, and out of the River Dart, and the adjacent shores and banks of the same river, in the county of Devon, with all rights, privileges, and appurtenances whatsoever, attached or appurtenant to the said fishery, as fully and amply as the said Duke was entitled to the same; and also all that sand-bank, situate and lying in the parish and manor of Berry Pomeroy, in the county of Devon;" to hold to Mills, his executors, &c., for three years, at a yearly rent of 401. for the fishery, and 5s. for the sand-bank: and it was proved that Mills was in possession under that agreement. It was thereupon objected, that the plaintiff having granted a lease of the fishery to Mills, was not in a situation to maintain this action, which ought to have been brought in the name of Mills. The learned Judge was of opinion, that upon the evidence in the case, the jury might presume a grant, before the time of Henry the third, of the exclusive right of fishing in the River Dart, which was then vested in the plaintiff; and that as the Dart was a navigable river, where the tide ebbed and flowed, that right was an incorporeal hereditament, lying in grant, and not in livery, and in which therefore a term of years could not be granted but by deed. His Lordship, therefore, directed the jury to find for the plaintiff, giving the defendant leave to move to enter a nonsuit; and a verdict was, accordingly, entered for the plaintiff, on the second and fourth counts.

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Selwyn, in Easter term last, obtained a rule nisi for entering a nonsuit, against which

Erskine now shewed cause. The trespass was committed in a navigable part of the River Dart, where the tide ebbed and flowed, and in which the plaintiff proved an immemorial and exclusive right of fishing. He might legally have acquired that right by a grant from the crown prior to Magna Charta, and there was abundant evidence to warrant the presumption that the grant was so acquired. The verdict is confined to the second and fourth counts; and upon the former of those, which is the material one, and which alleges a trespass in the plaintiff's several fishery, these three questions arise. First, is the plaintiff's right properly described? Second, is trespass the proper remedy for an injury to such a right? Third, is the action maintainable by the present plaintiff, and in Now, first, an exclusive right of fishing, his name? whether it be claimed in a man's own soil, or in that of another, and whether in private waters, or in a public river, is well described as a several fishery. Mr. Justice Blackstone, indeed, lays it down, that "he that has a several fishery, must also be, or at least derive his right from, the owner of the soil;" but he adds, "it must be acknowledged, that the rights and distinctions of the three species of fishery are very much confounded in our law books; and that there are not wanting respectable authorities which maintain, that a several fishery may exist distinct from the property of the soil:" and he refers to those authorities as "well digested, in Hargrave's

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Notes on Co. Litt. 122;" and which certainly support the position he attributes to them, but from which he dissents himself (a). But the real distinction between a several and a free fishery, seems more correctly stated by Lord Mansfield, in Seymour v. Lord Courtenay (b), where he says, "in order to constitute a several fishery, it is requisite that the party claiming it, should so far have the right of fishing independent of all others, as that no person shall have a co-extensive right with him in the subject claimed; for where any person has such co-extensive right, there it is only a free fishery." Now, it is quite clear, that the plaintiff has exercised an exclusive right of fishing in the place in question, without any person having or claiming a co-extensive right with him; and in both the chirographs of the fines, the fishery is mentioned as separalis piscaria: it follows, therefore, that the second count properly describes the plaintiff's right as a several fishery. Second, trespass is the proper remedy for an injury to that right. "To entitle a man to bring trespass, he must, at the time when the act was done which constitutes the trespass, either have the actual possession in him of the thing which is the object of the trespass, or else he must have a constructive possession in respect of the right being actually vested in him." That is the rule laid down by this Court in Smith v. Miller(c), and within the latter part of it, the present plaintiff clearly comes; for, as the owner of a several fishery, he has the exclusive right of taking fish within particular limits, and therefore, has the constructive possession of all the fish that are within those limits, and may properly describe them in a declaration as his fish. Smith v. Kemp (d), Child v. Greenhill (e), Sutton v. Moody (f), Seymour v. Lord Courtenay (g). Third, this action is maintainable by, and in the name of the present plaintiff; for he has not

<sup>(</sup>a) 2 Bl. Comm. 39.

<sup>(</sup>b) 5 Burr. 2814.

<sup>(</sup>c) 1 T. R. 475.

<sup>(</sup>d) 2 Salk. 637.

<sup>(</sup>e) Cro. Car. 553.

<sup>(</sup>f) 1 Ld. Ray. 250.

<sup>(</sup>g) 5 Burr. 2814.

by granting a lease of the fishery to another, divested himself of the right to sue for an injury done to the fishery. Upon this point, Rex v. Ellis (a), will, perhaps, be relied on for the defendant, but that is very different from the present case. There the question agitated was, how far a valid demise of a fishery could convey any interest in the soil; but no such question arises here. There is no demise of the soil here, for the lease to Mills is not under seal; and it makes no mention of the bed of the river, except as regards one sand-bank, which is demised separately from the fishery, and upon payment of a distinct rent. Even if this were a fishery in a private river, where the right of fishing arose out of, and dependent upon the right of soil, no legal interest whatever would pass to the lessee under this lease; but this is a fishery in a public navigable river, where the tide ebbs and flows, and is a royal franchise, altogether unconnected with, and independent of any right to the soil, and which cannot be conveyed to another, except by deed. This lease can operate only, therefore, as a license to fish, not vesting any legal interest in the lessee, and not divesting the lessor of his constructive possession of the fish, which entitles him to maintain an action of trespass against any one who takes them without his permission.

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Selwyn, contrà. Contradictory as the authorities upon this subject are, it may yet be admitted that a several fishery may exist distinct from the ownership of the soil, and that where it does, it may be considered as an incorporeal hereditament, lying in grant, and not in livery, and transferrable only by deed. Mr. Hargrave, in his note to Co. Litt. 122, after stating all the authorities and arguments on both sides of the question, says, "Hence, as it should seem, the arguments are short of the purpose, for at the utmost they can only prove that a several piscary is presumed to comprehend the soil, till the contrary appears.

(a) 1 M. & S. 652.

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which is perfectly consistent with Lord Coke's position, that they may be in different persons; and, indeed, appears to be the true doctrine on the subject." Now, if that is correct, and if the plaintiff has a several fishery, it must be presumed that he had the soil also, because the contrary does not appear; and, if he had the soil, he might divest himself of the possession by a parol demise; and the words, "all his the said fishery," in the agreement, would vest in Mills the property in the soil. In that view of the case, the action ought to have been brought in the name of Mills, and the rule for a nonsuit ought to be made absolute.

The Court took time for consideration. Judgment was now delivered by

BAYLEY, J., who, after stating the pleadings at length, thus proceeded. The real question, in this case, was, whether the Duke of Somerset, by the agreement which he entered into with Mills, had lost his right to maintain the By that agreement, he contracted to let to Mills all his fishery in the River Dart, with all rights and privileges appurtenant to the said fishery, for a term of years extending beyond the time when the trespass was committed; and if he thereby legally dispossessed himself of the right of fishery for that term of years, he cannot maintain this action, and a nonsuit must be entered. was contended, on the part of the Duke, that he was not so dispossessed, because the fishery lay in grant, and he could not create a term, even for years, in it, except by deed; and it was admitted, on the part of the defendant, that if the fishery lay in grant, that would be the consequence. We have looked into the authorities bearing upon that point, and we find many which shew that a term for years in a thing lying in grant can be created by deed only. Many of these cases are collected in 14 Viner's Abridgment, title Grant (G. a); and most of them are to be

found also in 2 Rolle's Abridgment, 63, title Grant (G); and as this is a question of considerable importance, I think it right to mention one or two of them. Lord Coke, in his commentary on the words "Per Fait ou sauns Fait," in Littleton, s. 116, says, "Here Littleton affirmeth that the wardship of the body may be granted over without deed: and herein note a diversity between an original chattel of a thing that properly lyeth in grant, and a chattel derived out of a freehold of any thing that lyeth in grant. As, for example, if a man make a lease for years of a villein, this cannot be done without deed, neither can the lessee assign it over without deed, because it is derived out of a freehold that lyeth in grant; but the wardship of the body is an original chattel during the minority, derived out of no freehold, and therefore, as the law createth it without deed, so it may be assigned over without It is not a little singular, that both Lord Rolle and Viner, in the passages I have already cited from them, mention that case, using the word vill instead of villein; but that is clearly a mistake. In 2 Rolle's Abridgment, 63, pl. 14, it is laid down that a parson cannot grant his tithes to a stranger, for life, or for years, without deed, because it is entirely in grant; in pl. 16, that it makes no difference whether the grant is for one year, or for several; and in pl. 17, that there is a distinction between tithes granted to a stranger, and to the owner of the land. But that is a well known and familiar distinction, and a grant of tithes to the owner of the land may clearly be without deed, because it is in the nature of a composition for the tithes retained, rather than an actual grant of the tithes themselves. In Viner's Abridgment, title Grant, (G. a) pl. 29, it is said that a warren may be demised without deed, and Godbolt, 74, is cited as an authority for the position; but the Year Book, 9 Ed. 4, 47, is also referred to, where it is said that a warren cannot be leased without deed, and the

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same doctrine is laid down in Brooke's Abridgment, title Lease, pl. 12, and was acted upon in the case of Saunders v. Owen (a). Besides, much would depend on the nature of the warren demised; for if it was a demise of a warren with the land, where by the term warren the land would be intended, it would be good without deed: but otherwise it would not. Then, was the fishery, which was the subject-matter of the agreement in this case, an incorporeal hereditament, lying in grant, or a corporeal hereditament, lying in livery? There was no evidence of any conveyance, either of the right of fishery, or of the soil, and the fishery appeared to be, not a fishery belonging to the owner of the adjoining land, in respect of the land, but a fishery in a navigable river, within the ebb and flow of the tide, and consequently in the nature of a royal franchise, which in 2 Bl. Comm. 39, is designated a free fishery. Such a franchise, undoubtedly, could not be granted by the crown since Magna Charta; but in this case the jury have found, and the evidence fully warranted them in so doing, that it existed from time beyond legal memory. The chirographs of two fines which were produced, one in the reign of Edward the sixth, and the other in the reign of Philip and Mary, both expressly mentioned the fishery, as a several fishery in the River Dart. Then, does a several fishery necessarily imply an ownership of the soil, or, may it exist independently of it? Upon that point much legal discussion has taken place; but when I consider the nature of the franchise itself. and the law with respect to fisheries in rivers generally, I have no hesitation in saying that in my opinion this was not a territorial or corporeal hereditament, but a merely incorporeal franchise. My Lord Coke, in his Commentary, says, "If a man be seised of a river, and by deed do grant separalem piscariam in the same, and maketh livery of seisin secundum formam chartæ, the soil doth not pass, nor the water, for the grantor may

(a) Salk. 467.

take water there; and if the river become dry, he may take the benefit of the soil, for there passed to the grantee but a particular right, and the livery, being made secundum formam chartæ, cannot enlarge the grant. the same reason, if a man grant aquam suam, the soil shall not pass, but the piscary within the water passeth Now that supposes a grant made by the therewith" (a). owner of the soil, capable of granting the soil, and yet shews that a grant of a several fishery, though followed up by livery, which applies only to what is corporeal, would not convey the soil, the livery being made secundum formam chartæ. Then if nothing is granted but a fishery, nothing passes to the grantee but a right to take the fish; he acquires no property either in the water, or in the soil. That is the case, where the grant is made between subject and subject, where the grant is to be construed against the grantor and in favour of the grantee; it would, therefore, clearly be the case where the grant is from the crown to a subject, where that rule of construction does not apply, but where nothing is held to pass, unless the intention that it should pass is manifest upon the face of the instrument. The leading case of the fishery of the river Baune (b) is in point. There James the first, who had the fishery of the Baune, a navigable river, as part of the ancient inheritance of the crown, by letters patent granted to Sir B. M'Donnell in fee, the territory of Rout, part of the county of Antrim, and adjoining to that part of the river where the fishery was, together with "omnia castra, messuagia, piscarias, piscationes, aquas, aquarum cursus," &c. It was held that under this grant of the adjoining land, and of all piscaries, the fishery of the river Baune did not pass, because it was a royal fishery, not appurtenant to the land, but a fishery in gross, and part of the inheritance of the crown; and that general words in a grant from the king, would not pass such a special royalty, because in a grant from the

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# GENERAL RULE.

	£	s.	d.
Where such distance exceeds five miles .	2	2	0
And in case he shall be necessarily absent more	;		
than one day, then for each day after the first	;		
a further fee of	1	1	0
Fee to each of the shewers the same as to the	<b>;</b>		
under sheriff, calculating the distance from			
their respective places of abode.			
Fee to each common juryman, per diem .	0	5	0
Fee to each special juryman, per diem .	1	1	0
Allowance for refreshment to the under sheriff,			
shewers, and jurymen, whether common or			
special, each, per diem	0	5	0
To the bailiff, for summoning each juryman,			
whose residence is not more than five miles			
distant from the office of the under sheriff	0	2	6
And for each, whose residence does not exceed	•	~	-
	0	5	0
The second secon	•	•	•

BY THE COURT.

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TO THE

# PRINCIPAL MATTERS.

#### ACTION.

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# ADMINISTRATOR.

Declaration in assumpsit, by administratrix, upon a promissory note given to intestate, averring, that administration of all and singular the goods, &c., of intestate, was duly granted to her by the bishop of C. Plea, that plaintiff was not, nor ever had been administratrix of all and singular et formâ. Issue thereon. Proof of the letters of administration as described in the declaration; and proof that intestate, at the time of his death, had bona notabilia in another diocese in a different province; no evidence of the place of defendant's residence at the time of intestate's death :- Held, first, that the letters of administration were not void, but passed to plaintiff all the goods of intestate within the diocese of C.; second, that the only issue joined was, whether administration was duly granted by the bishop of C.; and that the question, whether defendant at the time of intestate's death resided within WOL, VIII.

the diocese of C., was not parcel of that issue: and third, that if defendant relied on the fact of his residence within a different diocese. he was bound to plead it specially. Stokes v. Bate, T. 7 G. 4. page 247

> AFFIDAVIT. See PRACTICE, 6, 9.

> > AGENT. See DEED.

the goods, &c., of intestate, modo A contract by A. to let, and by B. to take, the milking of 30 cows at 71. 10s. per cow, per annum, from 14th February, the rent to be paid quarterly, in advance; and by  $\dot{C}$ , to pay the rent; is an entire, and not a divisible contract. In such a contract C. is a mere surety, and in an action against him for the rent, A. must prove a literal performance of the contract on his part. Any variation made in such a contract by A. and B., without the consent of C., discharges the latter, though his risk is not thereby increased. Per Bayley and Holroyd, Js.; Littledale, J., dissentiente. Whicher v. Hall, E. 7 G. 4. 23

## ALIEN.

#### See HEIR.

A. a native of America, and B. a native of England, had dealings by mutual consignments previous to 1812. In June, 1812, war was declared between the two countries, and on 24th December, 1814, preliminaries of peace were signed at Ghent. A cargo of goods consigned on account, by A. to B, arrived in *England* in *November*, 1814, and were sent by  $B_{\cdot}$ , to France, and there sold, and he received bills for the amount, which he got discounted. Another cargo, so consigned, arrived in England in January, 1815, and was sold by B. before the 15th February. March, 1815, B. became bankrupt, and was appointed by his assignees their agent to wind up his affairs; in the course of which employment he received the proceeds of the 3. A cause, and all matters in differsecond cargo, and transmitted accounts to A., in which he admitted A. to be his creditor for a balance in respect of the proceeds of both cargoes. In an action by A. against the assignees of B. to recover such balances: -Held, that A. was entitled to prove under B.'s commission for the balances due to him upon the second cargo only. Ogden v. Peel, E. 7 G. 4. page 1.

ALIMONY. See Baron and Feme, 2.

AMERICA.

See ALIEN .--- HEIR.

## ANNUITY.

A joint obligor of a bond for the payment of an annuity, who has been discharged under the Insolvent Act, cannot be arrested on the bond for arrears of the annuity accrued since his discharge. Collins v. Lightfoot, T. 7 G. 4. page 339

#### ARBITRATION.

1. Where a cause was referred to arbitration by an order at Nisi Prius, and the arbitrator after a notice of revocation in writing, made an award directing a verdict to be entered for the defendant, the Court set the award aside, even assuming it to be a nullity. Doe d. Turnbull v. Brown, E. 7 G. 4.

2. A judge's order enlarging the time for an arbitrator to make his award, should shew on the face of it that the time was enlarged with the defendant's consent, before the latter can be attached for not performing the award; but it seems that the defendant's consent may be collected from other circumstances so as to cure the objection. Halden v. Glasscock, E.7 G.4. 151

ence, between a plaintiff and two defendants, were referred by order of Nisi Prius to an arbitrator, with power to enlarge the time for making his award by indorsement on the order of reference; the costs to abide the event. The arbitrator did enlarge the time for making his award, by indorsement on the order of reference, and awarded "that there is nothing due to the plain-One of the defendants attended before the arbitrator. The Master taxed the costs of the cause and the reference in one sum. to that one defendant, who made the order of reference, with the arbitrator's indorsement thereon, a rule of Court, and demanded the costs from the plaintiff, who refused to pay them :-Held, first, that the award determined the right of action between the parties, and was sufficiently final. Second, that the rule of Court was a sufficient foundation for an attachment for not performing the award, without an affidavit that the time was duly enlarged. And, third, that an attachment would not lie for the non-payment of the costs to the one defendant only. Semble, that the Master had not power to tax the costs separately to the several defendants. Dickins v. Smith, T. 7 G. 4. page 285

- 4. Improper conduct of an arbitrator in making his award, without allowing the defendant further reasonable time to bring forward and examine his witnesses, cannot be pleaded in bar to an action on the bond, conditioned for the performance of the award; though one of the terms of the submission is, that the arbitrator shall examine the witnesses to be produced by the parties, and though the whole of the time limited for the making of the award is occupied in the examination of the plaintiff's witnesses. Grazebrook v. Davis, T. 7 G. 4.
- 5. Where an award was published in the interval between the essoignday and the first day of full Trinity term:—Held, that a motion might be made for setting it aside in the following Michaelmas term; the essoign being considered the first day of the term within the meaning of 9 & 10 W. 3, c. 15. In re Burt, T. 7 G. 4.

ARBITRATOR.

See Arbitration.

ARREST.
See Annuity.

ASSIGNOR AND ASSIGNEE.
See Lease, 3, 4.

#### ASSUMPSIT.

See AGREEMENT.—CARRIER, 2.— EVIDENCE, 3.—LEASE, 4.

Assumpsit by the payee, an infant nine years old, of a promissory note " for value received" against the executor of the maker. No consideration was proved. The Judge directed the jury that the words " for value received," implied an existing legal consideration, and that affection for the payee, or friendship for his father, or a desire to avoid the legacy duty, would be sufficient:-Held, that neither of these was a sufficient consideration: and, that as the jury had been misdirected in that respect, a new trial must be had, though, without that direction, the jury might have presumed an existing legal consideration. Holliday v. Atkinson, E. 7 G. 4. page 163

# ATTACHMENT.

See Costs.—Practice, 3, 4, 5, 6, 7, 8, 12.

## ATTORNEY.

See Authority.—Justices, 4.— Sheriff's Officer.

If an attorney's bill is reduced on taxation by a sixth part of the amount of the bill delivered, he must pay the costs of the taxation to his client; the Court having no discretion in the matter. Dickens v. Woolcott. T. 7 G. 4. 589

# AUTHORITY.

 An authority to an agent to execute an indenture under seal, must also be under seal.

The execution of an indenture by an attorney, must be in the name of the principal, in order to be binding upon the latter.

3. A deed inter partes can only be available between the parties thereto; therefore, where in covenant upon an indenture of lease, it appeared, that the landlord by writing not under seal, authorised his attorney to execute the lease for and on his (landlord's) behalf, and the attorney signed and sealed the

lease in his own name:—Held, that the landlord could not maintain covenant against the tenant upon the indenture, although the covenants were expressly stated to have been made by the tenant, to and with the landlord. Berkeley v. Hardy, E. 7 G. 4. page 102

#### AWARD.

See ARBITRATION.

# BAIL.

See Evidence, 2.—Practice, 3, 4, 5, 6, 7, 8.

Bail committed to Newgate for prevarication as to the state of his circumstances and property, on coming up to justify. Wilson v. Bodkin, E. 7 G. 4.

# BANKER.

#### See PAVING.

- 1. Where a servant received on behalf of his master, in payment of goods sold, country bank notes at one o'clock on a Friday afternoon, and paid them to his master after banking hours on Saturday evening, and between three and four in the afternoon of Saturday the bank stopped payment:—Held, that the master was not guilty of laches in not presenting the notes before the bank stopped on the Saturday.

  James v. Holditch, E. 7 G. 4.
  - 2. A customer drew upon his banker a check for 3l., and paid it away. The amount of the check was altered by the holder to 200l., in such a manner that no one in the ordinary course of business could have observed it, and presented, and the 200l. paid by the banker:

    —Held, that the banker was liable to the customer for 197l., the difference between the amount of the

genuine and the altered check. Hall v. Fuller, T. 7 G.4. page 464

# BANKRUPT.

See Alien, 1.—Baron and Feme, 1.--Bond.--Execution.--Lease. Paving, 2.—Promissory Note.

In December, 1811, A., who was then in parts beyond seas, being indebted to B., a bankrupt, in 1000l., the assignees of the latter issued against the former writs of special capias, alias, and pluries, in Michaelmas term, 1812, and Hilary term, 1813, which were delivered to the sheriff, and by him indorsed non est inventus, but retained in his office. In 1814, A. being detained by contrary winds in the Downs, went on shore at Deal, and remained there for several days, waiting to resume his voyage, but the fact of his having landed was then unknown to his assignees. In 1819, he returned to England to reside permanently; and in 1821, the assignees struck a docket against him for the debt above mentioned, and on 21st March in that year, he was adjudged a bankrupt. Upon being allowed to bring an action to try the validity of the commission, the attorney for the petitioning creditors, on the 21st May, 1821, two days after the action was commenced, took away the several writs from the sheriff's office, and on the 11th July, 1821, the last day of Trinity term, a roll of the proceedings with the continuances on the writ of pluries, brought down to the term next preceding the date of the commission, was docketed and carried in, and on the same day the three writs were filed of record:—Held, upon these facts, that the assignees of B. had not at the time of suing out the commission against A., or on the 21st March, 1821, when he was declared a bankrupt, a valid debt, as petitioning creditors, to support the commission. Gregory v. Hurrill, T. 7 G. 4. page 270

# BARON AND FEME.

See Evidence, 2.

- 1. A feme sole trader who kept a horse and chaise to visit her customers, before marriage, by deed conveyed to trustees "all her household furniture, goods, and chattels," (specified in a schedule in which the horse and chaise were not included), and "all her stock in trade, materials, and other articles, belonging to her, in and about her said business." After marriage she used the horse and chaise as before: - Held, that the horse and chaise passed to the trustees by the deed, and were not liable to be taken in execution for the debts of her husband. Dean v. Brown. E. 7 G. 4.
- 2. A husband is liable for necessaries supplied to his wife pending a suit between them in the ecclesiastical court, until alimony is assigned: nor does a decree, directing the alimony to be paid from a date preceding the time when the necessaries were supplied, remove his liability. Keegan v. Smith, E. 7 G. 4.

BIRMINGHAM.

See CANAL.

BONA NOTABILIA.

See Administration.

#### BOND.

See Annuity.—Replevin.

Where A. gave certain creditors a bond in the common form conditioned for the payment of a sum certain; and at the same time executed a deed of the same date, reciting the bond, and declaring

that it should be lawful for the obligees to commence an action thereon, and proceed to judgment whenever they should think fit; and that upon judgment being obtained they should be at liberty, at their will and pleasure at any time, to sue out execution thereon; and that it was farther agreed, that any judgment obtained on the bond. should stand as a security for payment to the obligees on demand, of all such sums of money as then were or might thereafter to them become due from the obligor:-Held, 1. That this was a contrivance to defeat the provisions of the Warrant of Attorney Act, 3 G. 4, c. 39, and therefore void as against the other creditors of the obligor, who had become bankrupt;—And. 2. That the obligee having entered up judgment in pursuance of the deed, and taken out execution without assigning breaches, and executing a writ of inquiry, the case was within the provisions of the 8 and 9 Wm. 3, c. 11, s. 8; and the execution was set aside. Hurst v. Jennings, T. 7 G. 4. page 424

#### BOROUGH.

See Corporation.—Costs, 4.

#### BROKER.

See STATUTE OF FRAUDS, 1.

# BYE LAW.

1. Where a person has been admitted a member of a corporate company, and has acted as such, it is not competent to him in an action for infringing the bye laws, to dispute the acceptance of the charter by a majority of those whom it intended to incorporate. Tobacco-pipe Makers' Company v. Woodroffe, T. 7 G. 4.

2. The charter of the Tobacco-pipe Makers' Company of London, pro-

fesses to operate upon all the tobacco-pipe makers throughout the kingdom: -Held, first, that assuming the charter could not by law have so extensive an operation, it was competent to bind such tobacco-pipe makers as were admitted members of the Company, and had acted under the charter; and second, that the charter, in fixing the place of meeting for the Company within the city of London, or within three miles thereof, established such local limits as are requisite in 2. By 58 Geo. 3, c. 19, reciting all such a charter. Tobacco-pipe Makers' Company v. Woodroffe, T. 7 page 530 G. 4.

3. Bye laws for compelling, by means of pecuniary penalties, the attendance of merobers of a corporation, at corporate meetings, and the acceptance of corporate offices, are reasonable, and may be enforced by action at law. Id. ibid.

4. But a bye law, imposing a tax on the members of a corporation by the name of quarterage money, cannot be supported, unless it is shewn that the necessities of the Company require such contributions, and that the latter are commensurate with the former. Id. ibid.

# CANAL.

1. By 8 Geo. 3, c. 38, a canal navigation company was established, without power to the proprietors to appropriate to themselves water raised from mines along the line of the canal. By 23 Geo. 3, c. 92, another canal was made, giving to the company power to take gratuitously the water raised from mines within a certain distance of that canal, "provided the produce of such mines was carried along some part of the canal." By 24 Geo. 3, c. 4, both canals were incorporated, 3. In case against carriers for the loss but the provisions as to each, contained in 8 Geo. 3, and 23 Geo. 3,

respectively, were to be kept distinct and separate. The proprietor of a mine on the line of the first canal, raised coal, one-third of which was afterwards carried along part of the second canal:—Held, that the company's privilege of taking mineral water and not attach to his mine on the first canal, by reason of such partial conveyance of the produce along the second. Finch v. The Birmingham Canal Company, T. 7 G. 4. page 681 the previous acts, the same system of management is extended to all the canals and cuts made under those acts: -Held, that this provision did not affect the operation of 8 Geo. 3, c. 38, and give the company authority to take water raised from mines along the line of canal made under that act. Finck v. The Birmingham Canal Company. T. 7 G. 4. Id.

#### CARRIER.

1. A common carrier, who has given public notice that he will not be accountable for the loss of any parcel above the value of 51., unless entered and paid for accordingly, is not liable for the loss of a parcel worth more than 51., delivered to him by a person informed of his notice, and accepted by him without any demand for the carriage, although at the time of such acceptance he knew that the value of the parcel exceeded 51. Horne, E. 7 G. 4. 223

2. A special contract made by one of several joint coach proprietors for the carriage of parcels, is binding upon them all, though some of them became proprietors after the contract was made. *Helsby* v. Mears, T. 7 G. 4.

of goods delivered to them in Ireland, to be conveyed to England,

the question was, whether the importation of the goods was illegal, unless they had been entered at the custom-house: --- Held, that as illegality can never be presumed, it lay upon the carriers, who raised the question, to prove that the goods had not been entered. Sissons v. Dixon, T. 7 G. 4. page 526

# CASE, ACTION ON THE. See Carrier.—Lease, 4.

- 1. In an action on the case for negligence, where the declaration alleges a breach of duty, and a special consequential damage, the cause of action is the breach of duty and not the consequential damage, and |2. Where a charter released to a corthe Statute of Limitations runs from the time when the breach of duty is committed, and not from the time when the consequential damage accrues. Howell v. Young, E. 7 G. 4.
- 2. The owner of a carriage, hired a pair of job horses for the day, and the jobman sent one of his own servants to drive the carriage and horses, and an injury having happened to a third person through the negligence of the driver: —Held, per Abbott, C. J., and Littledale, J., that the owner of the carriage was not liable for the injury: Aliter, per Bayley and Holroyd, Justices. Laugher v. Pointer, T. 7 G. 4.

CERTIORARI.

See PAVING.

CHANCERY.

See New Trial, 2.

CHARTER.

See BYE LAW.—Costs, 4.

1. Where the commons by petition prayed the king, that a charter

made, and the liberties thereby granted, to a corporation, might be confirmed in parliament; and the king answered, that it was assented and agreed in parliament, that the liberties in the petition mentioned should be confirmed under the king's great seal-and the charter was confirmed by the king accordingly :--Held, that this proceeding in parliament was not an act of parliament, so as to prevent the king from granting to the corporation a new charter, varying the mode of election of their officers provided by the former charter. Rex v. Haythorne, E. 7 G. 4. page 228

poration the power of removing their members, which a former charter had reserved to the crown, and released also all causes of complaint against the corporation for non-compliance with the terms of the former charter: -Held, that the second charter could not be taken to have been founded upon the first, and that the first charter being void, would not therefore avoid the second. Id.

CHURCH.

See FINE.

CHURCHWARDENS.

See Lease, 2.—Overseers.

CLERGY.

See Church. — Ecclesiastical JURISDICTION. - FELONY. TRANSPORTATION.

# COGNOVIT.

A cognovit is not within the rule 15 Car. 2, requiring an attorney to be present on the part of a defendant in custody, executing a warrant to acknowledge a judgment; and 766

therefore where a defendant in custody signed a cognovit without the presence of his attorney, the Court refused to set aside the judgment and execution thereon, on a suggestion that the defendant was not aware at the time of the nature of the instrument which he signed. Bayley v. Taylor, E. 7 G. 4. page 56

# COMMISSIONERS.

See Paving.

# COMMITMENT.

See BAIL.—JUSTICES.

A warrant of commitment under the Smuggling Act, 6 Geo. 4, c. 108, s. 81, of a person [who had been refused to be received on board a ship of war, as unfit for the naval service] until he paid the penalty of 1001., need not shew that he had been examined by a surgeon, as the ground of the refusal to be received into the service: nor need the commitment shew, in terms, that the party had been "called upon to pay the penalty," before he was committed. Ex parte Edwards, E. 7 G. 4. 115

> COMMON. See MANOR.

CONTEMPT.

See Justices.

# CONTRACT.

See AGREEMENT.—CARRIER, 2.-FRAUDS, STATUTE OF.

#### CONVEYANCE.

See LEASE.

By deed of lease and release, M. H. conveyed to J. W., and to his heirs copyhold premises, habendum unto the said J. W., his heirs and assigns, from and immediately after the decease of M. H., to, for, and upon the several uses, ends, intents, and purposes thereinafter mentioned:—Held, that by the premises an immediate estate of freehold was given to J. W., and that the habendum did not make void the deed as conveying a freehold in futuro. Goodtitle dem. Dodwell v. Gibbs, T. 7 G. 4. page 502

# CONVICTION.

See Justices, 3, 4.—Paving.

# COPYHOLD.

- A copyholder, joint tenant, was capitally convicted of felony, and pardoned upon condition of suffering two years' imprisonment. The lord took no steps towards seizing the land. After the two years' imprisonment had expired, the copyholder brought ejectment against his joint tenant, who had ousted him:—Held, that the lord having taken no step towards seizing the land, it did not vest in him; and that the copyholder, being restored to his civil rights by the pardon, might maintain the action. dem. Evans v. Evans, T. 7 G. 4.
- 2. Copyholder in fee surrendered to the uses of an antecedent deed of settlement. The deed of settlement reserved a power of revoking the uses therein declared, and of limiting new ones. The power was duly executed, and previously vested estates were thereby devested: --Held, that the uses limited in the execution of the power were nevertheless valid. Boddington v. Abernethy, T. 7 G. 4.

## CORONER.

and assigns, divers freehold- and A coroner going one journey on the same day, to hold three inquisitions at the same place, is not entitled to 9d. per mile out of the county rates for his travelling expenses, as upon three journies. Rex v. Justices of Warwickshire, E. 7 G. 4. page 147

# CORPORATION.

See Bye Law.—Charter.—Costs.

- 1. In an action for tolls due to a corporation, the defendant, who had acquired the character of a corporator after the cause of action arose, but before trial, has no right to inspect the corporation books, and must still be considered as a foreigner quoad this action. Mayor, &c., of Bristol v. Visger, T. 7 G. 434
- 2. A corporator accepting a new office | 4. The returning officer in an uninincompatible with the old one, thereby absolutely vacates and surrenders the latter, and if he is ousted of his new appointment by quo warranto, he is not remitted to his original character, nor can a vote given at a corporate meeting whilst he filled the higher office de facto, be referred to his original office of an inferior degree. Rex v. F. Hughes, T. 7 Ğ 4. 708

#### COSTS.

See Arbitration.—Attorney. MISDEMEANOUR. -- NEW TRIAL, 3.—Perjury.—Practice, 1.— SHERIFF'S OFFICER.

- 1. A person who has been in custody more than twelve months, under an attachment for non-payment of costs, not exceeding 201., is not entitled to his discharge under the 48 Geo. 3, c. 123. Rex v. Clifford, E. 7 G. 4.
- 2. Where an action was brought in this Court for a debt of 91. 17s., and the plaintiff's demand was reduced, by partial payments on account, and the jury found a verdict

for the plaintiff for 11. 13s. 5-Held, that the defendant, who resided within the jurisdiction of the Middlesex county-court, was entitled, under the 23 Geo. 2, c. 33, a. 19, to his double costs of suit. Chadwick v. Bunning, E. 7 G. 4. page 155

- 3. Where the Court granted a rule for a new trial, on the application of the defendant in a case where the plaintiff succeeded, and the latter applied to amend his declaration, but discontinued the action, not chusing to pay the costs of the former trial, as the condition of the amendment:-Held, that the defendant was not entitled to the costs of that trial, notwithstanding the plaintiff's discontinuance. Grav 220 v. Cox, E. 7 G. 4.
- corporated borough sending members to parliament, is not liable to costs within the operation of 9 Anne, c. 20, in the event of judgment against him on a quo warranto information. Rex v. M. Kay, T. 7 G. 4. 393

#### COUNTY COURT.

See Costs, 2.—Variance, 1.

COUNTY RATES. See Coroner.

# COVENANT.

See Authority, 3.—Lease, 4.

However informally a breach of covenant may be assigned in a declaration, yet, after judgment by default, the Court will pronounce such judgment as will meet the justice of the case, notwithstanding the informality. Brookes v. Hebberd, E. 7 G. 4.

#### COVENT GARDEN.

See Tolls.

# DECLARATION.

See Practice, 3.

#### DEED.

See Authority .- Lease.

1. The grantor of a deed signed it, sealed it, and declared, in the presence of the attesting witness, that he delivered it as his act and deed; but kept it in his own possession: - Held, that the deed was effectual from the moment of its execution, though there was no delivery of it to the grantee, or to any person for his use. Doe dem. Garnons v. Knight, T.7 G. 4. page 348

2. The grantor afterwards delivered the deed to a third person for the use of the grantee, intending to renounce all control over it. third person was not the agent of the grantee, nor did the grantee ever receive or know of the existence of the deed, till after the death of the grantor:—Held, that the deed was effectual from the moment | 3. Devise of lands to testator's daughof such delivery. Id. ibid.

#### DEMURRER.

See Practice, 14.

# DEVISE.

See FINE.

1. S. T. being seised in fee of one moiety of certain freehold premises in the county of Surrey, and tenant for life, with power of appointment by deed or will, of the other moiety, devised as follows:-" I hereby give and devise all my freehold estates in the city of London and county of Surrey, or elsewhere, to my nephew, J. R., for his life, on condition that out of the rents thereof, he do from time to time keep such estates in proper and tenantable repair."-Held, that this A suit in the Spiritual Court against a devise was not an execution of the

power, and only passed to the devisee that moiety of which the devisor had an estate in fee. Denn d. Noel v. Roake, T. 7 G. 4. page 514

Devise of lands in these words:-" On the attainment of the age of 21 years of the eldest son of  $\overline{A}$ ., I give my real estate in B. to the said son for life, remainder to his first and every other son in strict settlement, and so on to every son of the said A., remainder" over. A.'s eldest son attained the age of 21, took possession of the estate, suffered a recovery to the use of himself in fee, and died, leaving a son who died under the age of 21, and unmarried, and three daughters, who are still living. A.'s second son attained the age of 21 and died, leaving a son who is still living:—Held, that the son of A.'s second son was entitled to an estate tail in the lands in question. by virtue of the will. Le Hunte v. Hobson, T. 7 G. 4.

ter, J. C., for life, " and from and after her death unto the heirs of the body of the said J. C., share and share alike, their heirs and assigns for ever." When testator died, his daughter J C., had one child living, and she afterwards had eleven others: -Held, first, that the words heirs of the body in the devise meant children: and, second, that a remainder in fee vested in the child of J. C., living when testator died, subject to open and let in all her other children, successively, as they came into esse. Right v. Creber, T. 7 G. 4.

# ECCLESIASTICAL JURISDIC-TION.

See Administration.—Baron and Feme, 2.

clergyman for incontinence, where

the object is to procure his suspension or deprivation, is not within the statute 27 Geo. 3, c. 44, s. 2, and need not be instituted within eight months after the offence committed. Free v. Burgoyne, E. 7 G. 4 page 179

### EJECTMENT.

See Conveyance.—Fine. — Scot-

- 1. A declaration in ejectment was left at the house of the tenant in possession, on Saturday, and received by him on the next day, Sunday, before the essoign day:—Held, that this was service of process on a Sunday, within the 29 Car. 2, c. 7, s. 6, and void. Doe d. Warren v. Roe, T. 7 G. 4.
- Acknowledgment by the tenant in possession, that he had received a declaration in ejectment on a Sunday, before the essoign-day of the term, the declaration having been, in fact, served on the premises on the preceding Saturday, is not sufficient to entitle the lessor of the plaintiff to judgment against the casual ejector. Doe v. Roe, T. 7 G. 4.

#### EMBEZZLEMENT.

#### See FELONY.

An indictment for embezzlement, under 39 G. 3, c. 85, must describe specifically some of the property embezzled. Where a prisoner pleaded guilty to an indictment charging, "that he received and took, on account of his master, divers sums of money, amounting in the whole to a large sum of money, to wit, the sum of 10l., and embezzled the same," and was adjudged to be transported:—Held, that the indictment was bad; and the Court reversed the judgment, and refused to remand the

prisoner. Rex v. Flower, T. 7 G. 4. page 512

#### ERROR.

See Transportation, 2.

The statute 27 Eliz. c. 8, which allows a writ of error into the Exchequer Chamber upon judgments in this Court, does not extend to suits in prohibition. Free v. Burgoyne, esq., T. 7 G. 4.

#### EVIDENCE.

See Frauds, Statute of.—Guaranty. — Justices. — Settlement by Birth.—Sheriff.— Variance, 2.

- An executor, who is also a debtor
  to the testator at the time of his
  death, is a competent witness in
  ejectment for the realty, to support
  the will, the issue being as to the
  sanity of the testator at the time his
  will was executed. Doe d. Wood v.
  Tees, E. 7 G. 4.
- 2. The wife of bail is incompetent to give evidence for the defendant, on whose behalf her husband became bound. Cornish v. Pugh, E. 7 G. 4.
- 3. In assumpsit for goods sold, a person who on the voir dire admits his joint liability with the defendant, is a competent witness for the plaintiff, Blackett v. Weir, E. 7. G. 4
- Where a prisoner to an indictment at he received and punt of his master, f money, amounting to a large sum of the the same," and was be transported:—indictment was bad; reversed the judgage of the deeds, or to give parol evidence of their contents. Rex v.

  4. On a question of settlement, a mortgagee, a rated inhabitant of the appellant parish, subpœnaed by the respondent parish, is not compellable under a subpœna duces tecum, to produce the title deeds of his mortgagor: nor can his attorney be allowed to produce an abstract of the deeds, or to give parol evidence of their contents. Rex v.

  Upper Boddington, T. 76.

# FEME SOLE.

## EXCEPTION.

See Practice, 7, 8.

EXCHEQUER.

See Excise.

EXCHEQUER BILLS.

See Paving.

#### EXCISE.

Plaintiff having a quantity of apples, by contract in writing, agreed with defendant to sell him his cider at 35s. per hogshead, to be delivered at T. at a future time, and to lend what casks he had empty for the cider, to be manufactured on plaintiff's premises, to be paid for before it was taken away. Plaintiff pounded his apples, and delivered the juice to defendant's servant, who proceeded to manufacture the Before the manufacture was complete, the cider and the casks, some of which belonged to the plaintiff, were seized by the excise officers, for being in an unentered place, and condemned in the Exchequer as defendant's property. In Devonshire, where the parties lived, cider means the juice as expressed from the apples. In assumpsit for the price of the cider and the casks:-Held, that the contract was for the sale of juice, not manufactured cider; that the delivery of the juice to defendant's servant, vested the property in defendant; that it was defendant's duty to have entered the premises; that his neglecting to do so rendered plaintiff's delivering the cider at T. impossible, and therefore unnecessary; and that the plaintiff, therefore, was entitled to recover the price, both of the cider, and of the casks. Studdy v. Saunders, T. 7 G. 4. page 403

#### EXECUTION.

See Baron and Feme.—Replevin, 2.—Sheriff.

An execution issued upon a judgment obtained by default, confession, or nil dicit, and levied upon the goods of a bankrupt before his bankruptcy, is not void by 6 Geo. 4, c. 16, s. 108; and this Court will not set it aside on motion. Taylor v. Taylor, E. 7 G. 4. page 159

### EXECUTOR.

See Evidence, 1.

Upon a plea of plene administravit, a probate stamp is presumptive evidence against an executor, that he has assets of the testator in hand to the amount which the stamp will cover, until the contrary is shewn. Foster v. Blakelock, E. 7 G. 4. 48

#### FEES.

See Coroner.—Sheriff's Offi-

## FELONY.

See Copyhold. — Transporta-

The statute 3 Geo. 4, c. 38, s. 2, which enacts, "that if any servant shall steal any money, &c., from his master, and shall be convicted thereof, and be entitled to benefit of clergy, he, instead of being subjected to such punishment as may now by law be inflicted upon persons so convicted, and entitled to benefit of clergy, may be transported for fourteen years;" does not extend to cases of petty larceny. Rex v. Ellis, E. 7 G. 4.

FEME SOLE.

See BARON AND FEME.

#### . PINE.

1. Plaintiff, in ejectment for land, proved acts of ownership, and a fine levied by the ancestor of his lessor. Defendant proved that the land was formerly part of the church-yard, and proved acts of ownership by the vicar: -- Held. first, that the fine was not a conclusive bar to the vicar, without clear evidence that the party levying it had then an estate of freehold in the land; and, second, that an adverse possession for twenty years is no bar to the church, except as submits to it. Runcorn v. Doe, T. 7 G. 4. page 450

2. Where a testator, being seised in fee of several estates, in the parish of C., partly paternal, and the remainder purchased at different times, devised the whole [consisting of nineteen messuages and eighteen acres of land] to his wife in fee, and afterwards levied a fine " of twelve messuages, twelve gardens, twenty acres of land, twenty acres of meadow, twenty acres of 2. A note in writing of a bargain for pasture, five acres of wood, and five acres of land covered with water," and died suddenly without re-executing his will:-Held, in ejectment by the heir at law for that the fine operated as a revocation of the will), that parol evidence was admissible to restrain the operation of the fine to one of the purchased estates on which were

3. A fine of land, simpliciter, will pass houses thereon; but aliter, where a particular intent is manifested. Id. ibid.

twelve messuages, so as not to pass

the estate in question. Denn d.

Bulkeley v. Wilford, T. 7 G. 4.

# FISHERY.

A several fishery in a navigable river, where the tide ebbs and flows, granted by the crown to a subject before Magna Charta, is a mere incorporeal hereditament, and a term for years in it cannot be created but by deed. Duke of Somerset v. Fogwell, T. 7 G. 4. page 747

# FORFEITURE. See LEASE.

# FRAUDS, STATUTE OF, See Excise.

against the same incumbent who | 1. A broker employed to effect a sale of goods for his principal, made a verbal contract with a vendee, and after entering it into his own book without signing it, delivered a bought and sold note to the vendor and vendee respectively, each paper differing in its terms:-Held, that there was no memorandum in writing of the contract to bind either party under the Statute of Frauds. Grant v. Fletcher, E. 7 G. 4.

the purchase and sale of goods, must state the price of the goods, or it will not satisfy the requisites of the 29 Car. 2, c. 3, s. 17. Elmore v. Kingscote, T. 7 G. 4. 343 the paternal estate (on the ground | 3. A contract for the sale of a growing cover of potatoes, to be dug by the vendor, and carried by the vendee, when at maturity, is not a contract or sale of lands, tenements,

or hereditaments, or any interest in or concerning them, within the meaning of the fourth section of the Statute of Frauds. Evans v. Roberts, T. 7 G. 4. A contract of sale was entered into

in these terms,—" I have this day sold the bark stacked at R. at 91. 5s. per ton of twenty-one hundred weight, to H. S., which he agrees to take, and pay for it on the 30th of November." Part of the bark was, in a few days afterwards, weighed and delivered to the vendee, who refused to take away the remainder:—Held, that the property in the residue did not vest in the vendee until the weight had been ascertained, and consequently that neither an action for goods sold and delivered, nor for goods bargained and sold, would lie against the vendee for the amount. Simmons v. Swift, T. 7 G. 4.

page 693

GAME.

See JUSTICES.

GAS.

See Poor RATE, 1.

GRANTOR AND GRANTEE.

See DEED, 1, 2.—FISHERY.

GUARANTY.

See SET-OFF.

A guaranty in these terms, "I do hereby agree to become surety for R. G. now your traveller, in the sum of 500l., for all money he may receive on your account," is sufficient to sustain a declaration averring the consideration to be, that the plaintiffs would keep and continue the traveller in their service. Ryde v. Curtis, E. 7 G. 4.

# HEIR.

See SCOTLAND.

The children of an American loyalist, who continued his allegiance to the crown of Great Britain after the colonies were separated from the mother country, and settled in America, are entitled to take lands by descent in England, within the operation of the statute 4 G. 2, c. 21, as natural born subjects of the crown of Great Britain. Doe v. Mulcaster, T. 7 G. 4. 593

HIGHWAY.

See WAY.

1. By a private inclosure act, the great tithes payable to the rector of a parish were abolished, and the commissioners were directed "to ascertain the net value of the tithes, and to affix a fair clear annual rent per acre, in lieu of, and in compensation for, the tithes, to the rector:—Held, that such rent was rateable to the repair of the highways, in the hands of the rector. Rex v. Lacy, T. 7 G. 4. page 457 2. Where the justices at petty sessions

2. Where the justices at petty sessions made an order allowing the accounts of a surveyor of highways, which accounts had not previously been verified before a single magistrate, pursuant to the General Highway Act, 13 Geo. 3, c. 78, s. 48:—Held, that they had no jurisdiction; that the whole proceeding was coram non judice; and that the order must be quashed. Rex v. Justices of Somersetshire. T. 7 G. 4. 733

INCLOSURE.

See WAY.—HIGHWAY.

INDICTMENT.

See EMBEZZLEMENT.

INFANT.

See Assumpsit.

INSOLVENT.

See Annuity.

ISSUE.

See New Trial, 2.

JUDGMENT.

America, are entitled to take lands See Covenant.—Embezzlement. by descent in England, within the operation of the statute 4 G. 2. Perjury.—Transportation.

JURY.

593 See GENERAL RULE.

**7**57

#### JUSTICES.

See Coroner. - Felony. High-WAY, 2.—TRANSPORTATION.

1. Quære. Whether a justice of the peace has jurisdiction to commit a person for contemptuously refusing to take an oath, and give evidence touching a charge of riot alleged to have been committed by a person then under examination. the plaintiff was committed by a justice " for refusing to give evidence before him, touching a certain riot and disturbance," without shewing that there had been a person charged before the justices, and that the plaintiff was apprised of the existence of such charge. with respect to which he was required to be examined as a witness:—Held, that the warrant of commitment was no justification of 1. Proviso in a lease, for re-entry, the magistrate in an action of tres-Cropper v. Horton, E. 7 G. page 166

2. A justice of the peace who is a rated inhabitant of a parish, cannot vote at sessions, either upon the determination of an appeal against the accounts of the overseers of his parish, or upon the propriety of granting a case for the opinion of the King's Bench. Rex v. Gutteridge, E. 7 G. 4.

3. Evidence in support of an information before a magistrate under the Game Laws, cannot be received in the absence of the defendant, at least, where he has not been personally summoned to appear to the information. Rex v. Commins, T. 7 G. 4. 344

Quære, whether, in such case, an attorney is by law entitled to be present, and to act for the defendant, before the magistrate. Id. ibid.

LACHES.

See Banker.

# LANDLORD AND TENANT.

See Authority.—Lease, 2, 3.

Where a tenant from year to year, at a rent payable half-yearly, quitted at the end of a current year without giving notice; and the landlord re-let the premises, before the end of the next half-year, to another tenant:—Held, that the landlord had evicted the first tenant, and could not maintain use and occupation against him for any rent subsequent to the period when he quitted. Hall v. Burgess, E. 7 G. 4. page 67

> LARCENY. See Felony.

#### LEASE.

See Conveyance.—Pleading, 2.

and that the lease should be void. if the lessee assigned without license. The lessee by deed assigned all his property, real and personal, to trustees, for the benefit of his creditors; and was afterwards declared a bankrupt:--Held, first, that the deed of assignment was an act of bankruptcy, and void. Second, that it did not operate as a valid conveyance of the lessee's interest under the lease. And, therefore, third, that it did not work a forfeiture. Doe d. Lloyd v. Powell, E. 7 G. 4. 2. Churchwardens only, cannot execute leases, as a body corporate, of parish lands, under 59 Geo. 3, c. 12, s. 17. Where the occupier of a house paid rent to churchwardens, and the latter afterwards demised the house by lease for a term to A., with notice to the tenant that he must consider A. as his landlord:—Held, in an action for use and occupation, that the tenant might impeach the lease, and shew that the lessee had no title derived

from the churchwardens. Phillips | v. Pearce, E. 7 G. 4. page 43

3. In an action by lessee against assignee of a lease, if the defendant produces the lease, it is unnecessary to prove the due execution of it, where the plaintiff has proved the due execution of the counterpart. Burnett v. Lynch, T. 7 G. 4. 368

- 4. Case (not covenant), lies by the assignor, against the assignee of a his implied duty to perform the covenants in the original lease, although the assignor has by the assignment parted with all his interest. And although assumpsit might lie, case was the better form of action for the injury sustained by the assignor in consequence of the assignee's breaches of covenant. Id. ibid.
- 5. By lease and release of June, 1750, and a common recovery suffered in pursuance thereof, C. and H. R. settled certain freehold estates to such uses as C., H. R. and D. his wife, and M. R. should appoint, and in default of such appointment, as to part, to the use of C. for life, and as to the residue, to the use of See Case, Action on the .- Ec-H. R. in fee. By lease and release of October, 1751, the latter made between A. and B., of the first part; C., H. R. and D. his wife, and M. R., of the second part; and W. M., J. L, R. W., and P. W., of the third part; C., H. R. and D. his wife, and M. R. did grant, bargain, sell, release, confirm, direct, limit, and appoint, to W. M., J. L., R. W., and P. W., in their actual possession being, the same estates, to hold to them in fee, for several uses there set forth:-Held, that by those deeds the legal fee in the estates so settled, did not vest in W. M., v. Griffith, T. 7 G. 4. 470

6. If a lessor, during the term, cuts · down trees growing upon the demised premises, which are fit only

for firewood, and the lessee takes them away, trespass will not lie against the lessee, at the suit either of the lessor or his vendee. Channon v. Patch, T. 7 G. 4. page 651 7. An exception in a lease of lands in Dorsetshire, of "all timber trees

and other trees, but not the annual fruit thereof," does not include apple trees. Bullen v. Denning, T. 7 G. 4.

lease, assigned by deed poll, upon 8. Proviso in a lease. "that if lessee committed waste, to the amount of 10s., lessor might re-enter." Lessee pulled down buildings, worth 101., and substituted others of a differ-In ejectment for a ent nature. forfeiture:-Held, that "waste" in the proviso meant such waste as must produce an injury to the reversion; and that it should have been left to the jury, in express terms, whether such waste, to the amount of 10s. had been committed. Dos v. Bond, T. 7 G. 4. 738

# LIMITATIONS.

CLESIASTICAL JURISDICTION.

Where a promissory note was made payable " two years after demand:" -Held, that the Statute of Limitations did not begin to run until. the two years after demand had elapsed. Thorpe v. Coombe, T. G. 4.

> LORD'S DAY. See SUNDAY.

> > MANOR.

See Copyhold. "1

J. L., R. W., and P. W. Wynne A lord of a manor, may, in respect of his right of soil in the commonable waste lands of his own manor, have a right to turn his own cattle on the commonable waste lands of another manor. Earl Sefton v. Court, T.7 G. 4. page 741

MARKET. See Tolls.

MARRIAGE. See BARON AND FEME.

METROPOLIS. See Paving, 1, 2.

MIDDLESEX.

See Costs, 2.

MINES.

See Poor Rate, 4.

MISDEMEANOR.

See NEW TRIAL.

The Court cannot compel a prosecutor to pay the expense of bringing a defendant in custody up to receive judgment for a misdemeanor; but if the defendant is too poor to come at his own expense, they will pass judgment upon him in his absence. Rex v. Boltz, E. 7 G. 4.

MORTGAGOR, See Evidence.

NEW TRIAL.

See Costs, 3.—PERJURY.

1. Where a defendant, convicted of a misdemeanor at the assizes, was committed to the county gaol to abide the judgment of this Court, and was detained for no other cause, the Court, on a suggestion of his inability to pay the expense of bringing himself up, allowed a motion for a new trial to be made without his personal attendance. Rex v. Boltz, E. 7 G. 4. 65

 Where, on an issue directed by the Lord Chancellor, to be tried at law, points of law were reserved for consideration, the motion for a new trial, with a view to have the points discussed, must be made in Vol. VIII. Chancery and not in the King's Bench. Stone v. Marsh, E.7 G. 4.71

#### NONSUIT.

Judgment, as in case of a nonsuit, may be obtained in Banc, by one of several joint defendants, if the plaintiff neglects to proceed to trial pursuant to notice. Jones v. Gibson, T. 7 G. 4.

NOTICE OF BAIL. See PRACTICE, 7, 8.

OFFICE.

See Corporation, 2.

OFFICER.

See Sherifp's Officer.

## OUTLAWRY.

Fraudulently and covinously departing the realm before the awarding of an exigi facias, in order to defeat a plaintiff of the means of recovering a just debt, and to avoid an outlawry, does not preclude the defendant (on error) from reversing the outlawry, if he was, in fact, beyond sea, at the time of the exigent, and from thence until after the time of the outlawry. Bryan v. Wagstaff, E. 7 G. 4.

# OVERSEERS.

A pauper met with an accident in the parish of A., and was wrongfully removed [but with her own consent] to the parish of B., to which she belonged:—Held, that being casual poor in A., the overseers of that parish were liable (without an express promise) to pay the expense of her cure in the parish of B. Tomlinson v. Bentall, T. 7 G. 4. 493

PAPER BOOK.

See PRACTICE, 14.

PARDON.

See Copyhold.
PARLIAMENT.

See CHARTER.

3 E

PAVING.

1. The Metropolitan Paving Act, 57 Geo. 3, c. 29, s. 135, prevents the removal into the superior courts, of "any rate, proceeding, conviction, order, matter, or thing."- Held, that a case granted by the sessions for the opinion of the King's Bench, upon the affirmance of a conviction under the act, was a thing within the meaning of s. 135, and could not be removed by certionari. Rex v. Justices of Middlesex, E. 7 G. 4. page 117 2. A paving act empowered commissioners to sue in the name of their clerk, for any sums due from certain persons therein named, or any other person or persons, payable by virtue of that act; and enacted. that if any treasurer, collector, officer, or other person, appointed by the commissioners to collect money, should become bankrupt with money of the commissioners in his hands, his assignees should .. pay the money in full, in preference to all other debts, except debts to withe King:-Held, that the commissioners might sue in the name of their clerk, the assignees of their banker, to recover the amount of their money in his hands at the time of his bankruptcy; though he had received from the commission-. . ers no written appointment as their banker. Frost v. Bolland, T. 7 ).: G. 4. 3. If, under the Metropolitan Paving Act, 57 Geo. 3, c. 29, s. 51, bankers receive money on account of the commissioners, and become bankrupts with such money in their hands, their assignees are liable to the refund the full amount: and this in extends to the proceeds of Exche-

> PERJURY. See Slander. '.

: quet bills belonging to the com-

Dougan v. Bolland, T. 7 G. 4.

missioners, but sold by the bankers.

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At Nisi Prius, the Judge refused to try an indictment for perjury, on the ground of the gross imperfection of the record; and the defendant being again indicted for the same cause, was found guilty, but obtained a new trial in the King's Bench. Instead of taking down the old record again, the prosecutor preferred a third indictment, and removed it into this Court:--Held. that the defendant was not entitled to have the proceedings, stayed, until the costs of the former proceedings were paid by the prosecutor. Rez v. Tremaine, T. 7 G. 4. 90

# PLEADING.

See Variance, 1, 2.

1. Trespass against a bailiff, for breaking and entering plaintiff's dwelling-house, and there remaining until plaintiff paid defendant a sum of money. Pica, that defendant entered under a writ of fi. fa. and warrant thereon directing him to levy. Replication, that before the writ and warrant were fully executed, defendant, exacted more than the sum he was entitled to levy:-Held, that the replication alleged no facts constituting thefendant a trespasser ab initio, and was therefore bad on dimmerrer. Shorland v. Govett, T. 7 G. 4.257 2. Declaration in devenant against the assignee of a lease for pon-repair, that all the interest of A., the lessee, came to defendant, by assignment, and that afterwards the premises were out of repair. Plea in bar, that defendant was at one time passessed of one-sixth of the premises, as tenent in common with B., C., and D.; and at another time of one third, as tenant in common with C. and D: and that no greater interest in the premises ever came: to: defendant: by assignment. On demurrer: -- Held, that the plea was bad, both in form and substance. Merceron v. Dowson, T. 7 G. 4. page 264

#### POOR.

See Overseers.—Poor Rate.— Settlement.

# POOR RATE. 1. Fixing pipes in the ground for the

conveyance of gas, to light a town,

is a rateable occupation of land, within the meaning of 43 Eliz., · c.2, and the occupiers are rateable to the extent of the increased value of the land so used, as long as it is applied to the purposes of a pipeway. Rex v. Brighton Gas Company, T. 7 G. 4. 2. The Birmingham and Worcester Canal Act, 31 Geo. 3, directed that the Company should be rated! in respect of their lands in the same proportion as other lands lying near the same should be rated. " and as the same lands would be rateable, in case the same were the · property ·of individuals in their natural capacityi" By another act, 38 Geo. 3, the like provision . was made as to the Company's mateability, only omitting the latter " words, " and as the same lands:" . liable to be rated for their lands. turdery only at the same value as other adjacent lands, and not according to the improved value underived from the land being used for when purposes of a canal. Rex v. St. Deter, Wordester, T. 7 G. 4. 331 3. The grantee of a light-house was "lassessed in a poor rate for "the

Ilight house, with the duties or conun tribution movies in respect of ships,

iii hoys, and barks, passing by the

an same." no Het secupied the light

· : house; and maintained a light

"there, by means of a servant,

milwithin the parish; but the duties

www.paid, and the light used, by

"the ships jout of the parish:

Held that the duties formed no

part of the value of the light house,

and were not rateable. Rex v. Coke, T. 7 G. 4. page 666
4. An engine erected and used by the owner and occupier of an ironstone mine, solely for the purpose of drawing water from the mine, is parcel of the mine itself, and not rateable to the poor. Rex v. Bilston, T. 7 G. 4.

#### POUNDAGE.

See SHEBIFF'S OFFICER.

# PRACTICE.

See Arbitration.—Cognovit.—

BJECTMENT.—Misdemeanon—

New Trial, 1, 2.—Nonsulst—

Outlawry.—Perjury.—Sme
Ries's Officer.

- 1. A plaintiff being nonsuited; was taken in execution by the defendant for the costs, and whilst in execution brought another action for the same cause, and the Court refused to stay further proceedings in the second, until the costs of the first action were paid. Beaven v. Robins, El 7-G. 42
- 2. Where an affidavit answered a rule nisi for setting aside proceedings for irregularity, with costs, but was written in a cramped and slovenly hand, the Court on that ground refused to grant the costs of the application. Bane v. Jones, E. 7 G. 4.
- 3. By the practice of this Court, a plaintiff cannot declare de bene esse upon non bailable process returnable the last general return of the term: Wilson v. George, E. 7
- 4. Where the time for justifying bail expired on the 7th, and time was given till the 9th February, to add and justify other bail, and on that day the defendant was rendered in discharge of his bail, and notice thereof was given on the same day to the plaintiff:—Held, that the sheriff was liable to be attached on the 10th, if the plaintiff had lost a

trial for the sittings after term. Waterhouse v. Eames, E. 7 G. 4.

page 137 5. A regular attachment against the

sheriff shall not stand as a security, unless the plaintiff has lost a trial within the term, nor where the defendant has been rendered before the last day of term. Id. ibid.

6. An affidavit in support of a motion for setting aside an attachment against the sheriff, may be entitled, " The King v. The Sheriff of Middlesex," without naming the cause in which the attachment has-been obtained. Fenning v. Hollyoak, E. 7 G. 4.

7. Parol notice of exception to bail is not sufficient; it must be written, and also entered, in the filazer's book, before the sheriff can be attached. Id.

8. It seems that the defendant's attorney may give notice of justification of bail put in by the sheriff, provided the exception has been properly entered. ibid.

9. The affidavit in support of a rule custody, upon the ground that the writ described him by the initial of his christian name only, must set out the defendant's christian name at full length in the title. Shaw v. Robinson, T.7 G. 4.

10. Applications to set aside process issued in vacation, must be made within the first four days of term, for mere technical objections. Steele v. Morgan, T. 7 G. 4.

11, Where a defendant had entered a cause in the Marshal's book, with a mark of ne recipiatur; and the plaintiff brought the cause on to trial on such entry, as an undefended cause, and obtained a verdict, the Court set aside the verdict for Watson v. Gowar, irregularity. T. 7 G. 4. 456

12. Where the return to a writ of laupon being arrested in his own

house, was confined to his bed by illness, and could not be removed without danger to his life, and so continued ill at and after the return of the writ, and for such cause the custody of the defendant was relinquished; the Court refused to grant an attachment against the sheriff, and allowed him to amend his return upon payment of costs. Baker v. Davenport, T. 7 G. 4. page 606 13. Where a summons for a better

particular of plaintiff's demand, was served four days before defendant's time for pleading was out, and the plaintiff had neglected to give a better particular, which rendered it necessary to take out a second and a third summons, which last was attended and discharged, and in the mean time, the defendant's time for pleading had expired, and therefore the plaintiff signed Judgment for want of a plea, and took out execution: - Held, that the plaintiff's proceedings were irregular. Glover v. Whatmore, T. T G. 4.

to discharge the defendant out of 14. By the practice of this Court, on a general demurrer to a plea of nil debet, in an action upon a bond, the paper book may be made up and delivered by the plaintiff's attorney to the opposite attorney, and need not be filed with the clerk of the papers. Herbert v. Taylor, 609 T. 7 G. 4.

#### PRINCIPAL AND AGENT.

See AUTHORITY.

PRISONER.

See EMBEZZLEMENT.

PROHIBITION.

ECCLESIASTICAL JURISDIC-See TION .- ERROR.

# PROMISSORY NOTE.

titat stated that the defendant, | See Administration, -- Assumpsit. -LIMITATIONS, STATUTE OF.

Where the maker of a promissory notice, with interest, " for value received," became bankrupt before notice had been given:-Held, that the note was within the 7 Geo. 1, c. 31, and proveable under his com-Clayton v. Gosling, E. mission. page 110 7 G. 4.

> PROVISO. See LBASE..

QUO WARRANTO. See Corporation.—Costs, 4.

RECTOR.

See HIGHWAY.

REGISTER.

See SETTLEMENT BY BIRTH.

# REPLEVIN.

See VARIANCE.

- The condition of a replevin bond for prosecuting the plaint "with effect," means prosecuting it " with success;" and, therefore, if a plaintiff in replevin fails, the bond is broken, and the defendant is not restrained from suing on the bond, though he omits to sue out a writ de retorno habendo, and cause elongata to be returned thereon. Perreau v. Bevan, E. 7 G. 4.
- 2. If the defendant in replevin elects to proceed on the statute, 17 C. 2, c. 7, he is not confined to his execution under that statute, but may sue the sureties on the replevin bond, or the sheriff in an action on the bond. Id.
- 3. In replevin for taking a stranger's cattle for rent in arrear, a plea, that the cattle "were not levant and couchant in the close in which, &c.," is bad on demurrer, for not shewing the circumstances under which the cattle came upon the close, so as to entitle them to be privileged from distress. Jones v. Powell, T.7 G. 4. 416

# SCOTLAND.

note, payable twelve months after A child born in Scotland, before marriage, of parents domiciled there, and who afterwards marry there, cannot inherit lands in England. Doe dem. Birtwhistle v. Vardill, page 185 E. 7 G. 4.

# SESSIONS.

See Justices, 2.—Paving.--Trans-. PORTATION.

# SET-OFF.

 $A_{\cdot,\cdot}$  a creditor of  $B_{\cdot,\cdot}$  agrees to receive his debt by instalments, of which C. guarantees the payment.  $B_{\cdot}$ , at the same time, contracts to sell to A. a quantity of bark, and delivers a part, which A. never returns, and then fails in his contract. One day after the first instalment becomes due, C. remits the amount, less the price of the bark delivered, . to A., partly in bills, and partly in bank notes; the receipt of which A. acknowledges, and promises to carry to the credit of B.'s account. In an action by  $A_{\cdot \cdot}$ , against  $B_{\cdot \cdot}$ , for the amount of the first instalment: -Held, first, that B. was entitled to set off the value of the bark delivered against A.'s demand; and, second, that though A. was not bound to accept the remittance, yet, having accepted it, he had waived all objection to it, and could not maintain the action. Shipton v. Casson, E. 7 G. 4. 130

# SETTLEMENT, by Birth.

the case, for negligence in losing | The register of baptism is not, alone, sufficient evidence of the place of a person's birth. Rex v. North Petherton, T. 7 G. 4. 325

# SETTLEMENT, by Estate.

Where a pauper contracted by parol for the purchase of a cottage and garden, at the price of 40l., and having paid 30l. on account, was let into possession without a conveyance; and after remaining in possession for twelve months resold the premises for the like sum of 40l., and having given up possession, paid the original vendor the 101. owing upon the purchase: -Held, that the pauper did not gain a settlement by the purchase of an estate or interest under 9 Geo. 1, c. 7, s. 5. Rex v. Llantilio Grossenney, T. 7 G. 4. page 320

# SETTLEMENT, by Hiring and Service.

Hiring for a year, with a stipulation on the part of the servant, consented to by the master, that the former shall have "during the year, two or three days to see her friends," is an exceptive hiring, and service under it gains no settlement. Rex . v. Leamington Priors, T. 7 G. 4. 239

# SHERIFF.

See General Rule .- Practice 3, 4. 12.— SHERIFF'S OFFICER.-VARIANCE, 1, 2:

Where, in an action for a false return to a fi. fa., the sheriff (who was not indemnified) proved that the goods of the debtor were absorbed by a prior execution:-Held, that the plaintiff might give evidence to show that the prior execution was concocted in fraud, it appearing that the sheriff had paid over the money, in defiance of notice to retain the proceeds in his hands until the first execution was set aside; and, consequently, that the sheriff was liable for his misconduct, in lending himself to the other party. Warmoll v. Young, T. 7 G. 4. 442

# SHERIFF'S OFFICER.

In an action by a sheriff's officer for his fees, and for work and labour in executing divers writs :- Held, first, that the prohibition in the statute, 23 Hen. 6, c. 9, against a sheriff's officer taking more than 8 & 9. c. 11. s. 8. certain fees upon an arrest, is con-

fined to the fees to be taken of the party arrested, and does not extend to restrain the officer from suing for a reasonable compensation for work and labour at the hands of the party by whom he is employed. Second, that a sheriff's officer, expressly employed by an attorney to execute process, may maintain an action against the latter for such fees, &c., as are usually allowed on the taxation of costs by the course and practice of the Court, and is not bound to resort to the clients of the attorney; and, third, that the officer may sue for the sheriff's poundage upon levies, where he is accountable over to the **sh**eriff. Foster v. Blakelock, E. 7 G. 4. page 49

# SLANDER.

The words; " H.'s oath ought not to be taken, for he has been a forsworn man, and I can bring people to prove it; and they that know him, will not sit in the jury box with him;" are not actionable, per se. Hall v. Weedon. E. 7 G. 4. 140

# SMUGGLING:

See Connitment.

# STAMP.

See EXECUTOR.

# STATUTES CITED OR COM. MENTED ON.

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57. c. 29.

**58.** c. 19.

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3. c. 39. Warrant of Attorney 424
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#### SUMMONS.

See Justices, 3—Practice, 13.

#### SUNDAY.

#### See EJECTMENT.

The statute 29 Car. 2, c. 7, "for the better observation of the Lord's-day," applies to private as well as public conduct; therefore, a horse-dealer cannot maintain an action upon a private contract for the sale and warranty of a horse, if made on a Sunday. Funnell v. Ridler, E. 7 G. 4. 204

TITHES.

See HIGHWAY.

TOLLS.

See CORPORATION.

The grantee of a market cannot main-

tain an action against an individual for selling goods without the market, and thereby defrauding him of the toll; without shewing that he has appropriated the whole of the market space, or, so much of it as the public convenience requires, to the purposes for which the market was granted. Prince v. Lewis, E. 7 G. 4 page 121

# TRANSPORTATION.

#### See FELONY.

A judgment of transportation for fourteen years, if bad for excess, is bad in toto; and cannot operate as a good judgment of transportation for seven years. Rex v. Ellis, E. 7 G. 4.

 Where a court of quarter sessions have passed an erroneous judgment of transportation, this Court will not send it back to be amended, but will reverse it, on writ of error. Id.

TREES.

See LEASE. 7.

TRESPASS.

See Lease – Pleading.

TRUSTEES.

Sec BARON AND FEME.

#### USE AND OCCUPATION.

See Landload and Temant — Lease, 2.

#### USES.

See Copyholder.

#### VARIANCE.

1. In an action on the case against a sheriff for negligence in losing a replevin bond, given by a party for prosecuting his suit with effect in the county court; the declaration averred that the plaint had been removed out of "the county court of the said sheriff," by re-fa-lo, &c.; and it appearing that at the time of the removal, the sheriff who had taken the replevin bond, was out of office:—Held, no variance, and

# 782 VENDOR AND PURCHASER.

that the word "said" might be rejected as surplusage. Perreau v. Bevan, E. 7 G. 4. page 72

- Bevan, E. 7 G. 4. page 72 2. Declaration in case, for a false return to a writ of fi. fa., stated "that plaintiff by the judgment of the Court recovered 391. 10s., adjudged to him for his damages by him sustained, as well by occasion of the not performing several promises, as for his costs," &c.; concluding with a prout patet per recordum. Upon production of the judgment it appeared, that a remittitur had been entered as to all the counts in the declaration except the first, and that the damages were awarded for the not performing the promise in that count mentioned only:--Held, a fatal variance. Edwards v. Lucas, E. 7 G.
- 3. Where baron and feme declared with A. jointly upon an agreement to demise lands to B., upon certain considerations thereunto moving, and averring the promises to the three, and it appeared in evidence that the agreement was entered into by an agent, for and on behalf of the wife, and A. only:—Held, a fatal variance, though the husband had received rent from the tenant, subsequent to the date of the agreement. Saunderson v. Griffiths T. 7 G. 4.
- 4. Count in the same declaration averring that the defendant was tenant to the three plaintiffs, and had agreed to farm the lands in a husband-like manner, and it appearing that the demise was only by two, and that the agreement was also, to keep the land constantly in grass:—Held, fatal variances. Id.

# VENDOR AND PURCHASER.

See Excise. — Frauds, Statute of, 1, 2, 3, 4.

## WORK AND LABOUR.

### WARRANT.

See COMMITMENT.—JUSTICES.

WARRANT OF ATTORNEY.

See BOND .- COGNOVIT.

WASTE.

See LEASE, 8.

#### WAY.

A public footway passed over a common, into and across a farm-yard, into a public highway. A local act for enclosing the common, empowered commissioners to stop up coads over it, provided that they should not stop up any old road leading over other land not to be inclosed, without the concurrence of two magistrates. The commissioners stopped up the public footway over the farm yard, without the concurrence of two magistrates:—Held, that the public right of way over the farm-yard was not extinguished, for the concurrence of two magistrates was necessary, under s. 8, of the General Inclosure Act, 41 Geo. 3, c. 109, in order to extinguish the public right of way over the new inclosure, as well as that over the old. Logan v. Burton, T. 7 G. 4. page 299

WILL.

See EVIDENCE.

WITNESS.

See Evidence, 1, 3.

WORDS.

See SLANDER.

WORK AND LABOUR.

See SHERIFF'S OFFICER.



